United States Court of Appeals
for the Second Circuit

APPENDIX

77-2103

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LOUIS OSTRER,

Petitioner, Appellant

-against-

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal From the United States District Court
For The Southern District of New York.

Appendix to Brief of the Petitioner, Appellant
Volume I

Alan Dershowitz
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(617) 495-4617
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(617) 723-2624
Co-counsel for Petitioner, Appellant.

PAGINATION AS IN ORIGINAL

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CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

Edelstein, Ch. J.

71 CRIM. 558

D. C. Form No. 100 Rev.

JUDGE ~~EDELSTEIN~~ [illegible] 9/[illegible]/72

TITLE OF CASE — ATTORNEYS

THE UNITED STATES — For U. S.:

vs.

1. ANTHONY SOLDANO - ALL CTS.
2. JOHN DIOGUARDI - ALL CTS. [illegible] 9, 13, 14, 16, 18, 19, 22-29, 32 to 36, 38, 39 — ROBERT G. MORVILLO, AUSA
3. GARY FREDERICKS - ALL CTS. [illegible] 3 + [illegible]
4. MICHAEL HELLERMAN - ALL CTS.
5. MICHAEL CARICATO - ALL CTS.
6. FRED GOODMAN - ALL CTS.
7. ~~RICHARD GREENBERG~~ - ALL CTS.
8. LOUIS OSTRER - ALL CTS.
9. MORRIS WINTER - ALL CTS. [illegible]

4/21

For Defendant:

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
			12/11/72	A. Soldano	5 —	
J.S. 2 mailed ✓	Clerk		12/15/72	U.S. Treas		5 —
[illegible]			1/12/73	[illegible]	5 —	
J.S. 3 mailed 1, (3), 7, 6, 2	Marshal		1/17/73	U.S. Treas		5 —
6, 8, 5, 4, 9 -			1/18/73	[illegible]	5 —	
~~[illegible]~~ Comp # 70-1947	Docket fee		1/26/73	U.S. Treas		5 —
	J. Dioguardi - Fined $30,000					
Title			[illegible]	[illegible]	100 —	
			[illegible]	Treas		100 —
Sec.			[illegible]	Caricato	100	
See below			[illegible]	Treas		100 —
			[illegible]	[illegible]	100 —	
			[illegible]	Treas		100 —
			5/11/74	Caricato	100 —	
FORTY COUNTS			[illegible]	Treas		100 —
			[illegible]	Caricato	100	
			[illegible]	Treas		100 —
			[illegible]	[illegible]	100	
			[illegible]	Treas		100 —
			[illegible]	[illegible]	100 —	
			[illegible]	[illegible]		100 —
			[illegible]	[illegible]	100 —	
			[illegible]	U.S. Treas	100 —	
			[illegible]	Treas		100 —
			[illegible]	[illegible]	100	
			[illegible]	Treas		100 —

DATE — PROCEEDINGS

T. 15, U.S.C., Sec. 77q(a) and 77x and T. 18, U.S.C., Sec. 2
Unlawfully in the offer & sale of securities employed devices which operated as a fraud & deceit upon the purchasers who were induced to purchase said securities. (Cts. 2 thru 10)
T. 15, U.S.Code, Secs. 78j(b) and 78ff; T. 18, U.S.C., Sec. 2
Unlawfully in connection with the purchase & sale of securities used manipulative & deceptive devices & contrivances in contravention of the rules & regulations of the S.E.C. (Cts. 11 thru 23)
T. 18, U.S.C., Secs. 1341 and 2
Unlawfully using the mails in furtherance of said scheme & artifice to defraud. (Cts. 24 to 40, incl.)
T. 18, U.S.C., Sec. 371
Unlawfully conspiring so to do. (Ct. 1)
(TOTAL - 40 COUNTS)

5-27-71 Filed Indictment.

DATE	PROCEEDINGS
6-1-71	ANTHONY SOLDANO-Robert Kasanof, Esq. assigned as atty under CJA, by Co Lawrence Kessler of counsel. Deft. pleads Not Guilty. Bail of $10,00 on 71Cr499 to be rewritten to cover this indictment. Bail limits to include Eastern Dist. of NY. Paroled until 4pm today to post bail. MICHAEL CARICATO-Pleads Not Guilty. Ordered photographed & fingerprint Released on own Recognizance. LOUIS OSTRER-Pleads Not Guilty. Ordered photographed & fingerprinted. Bail fixed at $10,000 unsec.PRB. Submit order extending bail limits to include continental US. Paroled until 4PM today to post bail. MICHAEL HELLERMAN-Pleads Not Guilty. Ordered photographed & fingerprinted. Bail of $10,000 surety bond plus $500 PRB on other indictments to be rewritten to cover this indictment. Paroled until 4PM today to post bails. All motions ret. in 10 days. FRED GOODMAN-David Blackstone, Esq. assigned as atty under CJA. Pleadi adj'd to 6-7-71. RICHARD GREENBERG-Abraham Solomon, Esq. assigned as atty under CJA. Pleading adj'd to 6-7-71. JOHN DIOGUARDI- GARY FREDERICKS- Pleadings adj'd to 6-7-71. MORRIS WINTER-- McGOHEY, J.
6-2-71	JOHN DIOGUARDI- Filed notice of appearance by Jay Goldberg, 635 Madison Ave, N.Y.C. Tel: 752-6655.
6-2-71	LOUIS OSTRER- Filed Unsecured Personal Recognizance Bond in the sum of Ten Thousand ($10,000.00) Dollars. Signed and acknowledged before John Livingston, Clerk By: E. Aponte, Deputy Clerk
6-3-71	MICHAEL HELLERMAN- Filed notice of appearance by Vincent L. Broderick, Esq., 477 Madison Ave, N.Y.C. 10022 of counsel Thomas D. Edwards, Esq. 36 W. 44th St., N.Y.C. Phone: 758-6700.
6-3-71	MICHAEL CARICATO- Filed notice of appearance by A. Martin Stuchiner, Esq., 295 Madi Ave, N.Y.C. 10017 Phone: 532-2656.
6-3-71	LOUIS OSTRER- Filed notice of appearance by Maurice Edelbaum Phone: 732-1300
6-2-71	LOUIS OSTRER- Filed order for enlargement of deft's bail limits to permit him to travel from the Southern District of N.Y. throughout the continental U.S. (mailed notice) so ordered EDELSTEIN, J.
6-2-71	JOHN DIOGUARDI- Filed affidavit of Robert G. Morvillo, AUSA for a writ of habeas corpus ad pros. Issued writ ret. 6-7-71.
6-7-71.	Richard Greenberg- Filed CJA Form # 2 order appointing counsel A. Solo 85 Baxter St. NYC - tel. 431-6542(copy mailed to W (Nunc Pro Tunc as of June 1, 1971) RYAN, J.
6-7-71.	John Dioguardi-) Gary Fredericks) Fred Goodman--) Pleading adjourned to June 10,1971 and referred to Judge Edelstein. RYAN, J.
6-7-71	R.GREENBERG, MORRIS WINTER-Plead not guilty.R.O.R.---

DATE	PROCEEDINGS
6-10-71	MORRIS WINTER- Filed notice of appearance by Murray G. Gottesman, Esq., By: Jack J. Elkin, Esq., 217 B'way, N.Y.C. 10007 Phone: Wo 4-5217.
6-11-71	ANTHONY SOLDANO- Pleading and securing of new counsel adjourned to June 24,1971 at 10:00 A.M. JOHN DIOGUARDI-Produced on writ- Barry Garfinkel assigned as counsel under CJA. Writ adjourned to June 24,1971. GARY FRIEDRICKS- Robert Mitchell, Esc assigned as counsel under C.J.A. FRED GOODMAN- Pleads Not Guilty. Bail fixed at $5,000.00. Presonal recognizance bond unsecured, to be rewritten to cover this indictment and 71 Cr 499. Motions returnable Oct. 4,1971 at 2:00 P.M. as to. Helleman, Canicato, Goodman, Greenberg, Ostner and Winter. EDELSTEIN, J.
6-15-71	FRED GOODMAN - Filed unsecured personal recognizance bond in the sum of $5,000.00. Signed and acknowledged before John Livingston, Clerk. By. E. Aponte, Deputy Clerk
6-16-71	FRED GOODMAN-Filed CJA form 2 order appointing counsel, David Blackstone, Esq., 401 B'way, N.Y.C. Phone: 226-6684. (mailed orig to Adm Off WashD.C.) EDELSTEIN, J.
6-21-71	JOHN DiGUARDI- Filed CJA form 2 order appoimting counsel, Edward S. Panzer, Esq., 299 Broadway, N.Y.C. 10007 Phone: 349-6123. (MAILED: copy to Adm Off Wash D.C.) EDELSTEIN, J.
*6-18-71	JOHN DioGUARDI- Deft produced on writ Edward Panzer assigned as counsel under C.J.A. Deft. pleads Not Guilty. Motions re- turnable Oct 4,1971 at 2:00 P.M.. Writ satisfied. EDELSTEIN, J.
6-24-71	ANTHONY SALDANO- Deft appears with atty. Pleading adj'd to July 2,1971 at 10:00 A.M. GARY FREDERICKS- Deft pleads Not Guilty. Released on own recognizan Robert Mitchell, Esq., assigned as counsel under C.J.A. Motions re- turnable Oct 4,1971 at 2:00P.M. EDELSTEIN, J.
6-25-71	GARY FREDERICKS- Filed CJA form 2 order appointing counsel, ROBERT MITCHELL, ESQ., 51 Chambers ST., N.Y.C. 10007 PHONE: Wo 2-0675. (MAILED: copy to Adm Off Wash D.C.) EDELSTEIN, J.
6-30-71	ANTHONY SOLDANO- Filed notice of appearance by ALBERT J. BRACKLEY, ESQ 44 Court St.,N.Y.C. 11201 Phone: 625-5634.
7-2-71	ANTHONY SOLDANO- Pleads Not Guilty. Cont'd on bail. EDELSTEI
7-7-71	DIOGUARDI- ~~Filed~~ Petition for Writ of Habeas Corpus Writ Satisfied 6/18/71
6-10-71	JOHN DIOGURDI-Filed notice of motion for dismissal,transferral, severance, disclosure, bill of particualrs and affidavit.EDELSTEIN, J.
AUG 23 1971	Filed Transcript of record of proceedings, dated 6-18-71.
AUG 26 1971	Filed T[illegible] proceedings, dated 6-24-71

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DATE	PROCEEDINGS
8-27-71	FRED GOODMAN-Filed notice of motion for bill of particulars and discov and insepction and affidavit. EDELSTEIN,J.
[illegible]	~~[illegible]~~error
8-30-71	FRED GOODMAN filed notice of motion for consolidation of counts3-10 wit count 2 of the indictment on the ground that the aforesaid counts are multiplicious and that counts 3 thru 10 be dismissed as separate count and affidavit. EDELSTEIN,J.
8-26-71	Filed Transcript of record of proceedings, dated 6-11-71.
9-3-71	MICHAEL HELLERMAN- filed notice of motion for order dismissing certain counts of the indictment, bill of particulars,discovery and inspection and severance and affidavit. EDELSTEIN,J.
9-3-71	MICHAEL HELLERMAN- filed memo of law in support of motions on behalf of deft. EDELSTEIN,J.
9-8-71	FRED GOODMAN- filed notice of motion for severance of the trial of the defs and affidavit. EDELSTEIN,J.
10-20-71	R. GREENBERG- filed notice of motion for bill of particulars,discover and inspection and affdvt. EDELSTEIN,J.
10-26-71	Filed Transcript of record of proceedings, dated 7-2-71.
1/5/72	Filed Transcript of record of proceedings, dated 10-5-71
1-25-72	Filed Transcript of record of proceedings, dated 11/15/71
1/25-72	Filed Transcript of record of proceedings, dated 11/4/71
4/3/72	ANTHONY SOLDANO _ following papers received from U.S. Magistrate docket sheet Appearance Bond- $10.000.00- Public Mutual Ins. Co.
7-24-72	John Dioguardi - Filed Defts. notice of motion for an order granting deft. bail on indictment 71 CR 558 - ret. 7-26-72 or as soon as counsel can be heard.
7-24-72	John Dioguardi - Filed memo endorsed on motion filed 7-24-72: Withdrwan - Edelstein Ch.J. (M/N)
8-30-72	Richard Greenberg-filed Govt's bill of particulars.
9-7-72	Louis Ostrer) John Dioguardi) Michael D. Hellerman) filed affvt. and notice of motion to sever the defts. for separate trial after the trial now sacheduled for Oct. 5, 1972 and for such other relied.

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	PROCEEDINGS
9-8-72	Filed affidavit and notice of motion for an order permitting the substitution of Jay Goldberg as atty of record for deft John Dioguardi in place of present atty...
9-8-72	Filed memo endorsed" Granted after Hearing" Edelstein.Ch.J.
9-6-72	Dioguardi- Filed affidavit of AUSA Andrew Schaffer.(writ)
9-11-72	Dioguardi.-Filed affidavit of AUSA.Andrew Schaffer. (writ)
9-13-72	L.OSTRER) Filed mamo endorsed on motion to server...GRANTED...Edelstein,Ch.J. JOHN DIOGUARDI) M.C.FELLERMAN)
9-13-72 ***	J.EDDIOGUARDI - Filed opposing affdvt.of Jay Goldberg,Esq. dtd.9-11-72
9-14-72	M.CARICATO - Filed affidavit and notice of motion for severance.
9-13-72	M.CARICATO - Filed memo endorsed on above motion....GRANTED...Edelstein,Ch.J.
9-13-72	Severed - For trial Oct. 5,1972 - Soldano,Fredericks, Goodman, Greenber and winter to follow- Osterer &Dioguardi Deft Caricatto's Motions for a seperate trial is granted. Edelstein CH,J. ....
9-26-72	Fredrick Goodman-DEPT withdraws not guilty plea and pleads guilty to ct. 1 only pre-sentence Investigation ordered. sent. adjd. and refferred to Lasker,J. Prob. notified. Edelstein CH.J.
9-18-72	Dioguardi - Filed WHC with Marshals return - Writ satisfied on 9-8-72
10-4-72	Dioguardi - Filed WHC with Marshals return - Writ satisfied on 9-13-72
10-5-72	A.SOLDANO) G.FREDERICKS) B.GREENBERG) JURY TRIAL BEGUN, before Judge Knapp... COUNTS 7,8,9,10,14,16,17, 18,19,20,21,22,23,31,32,33,34,35,36,38,39 DISMISSED ON CONSENT.... M.WINTER - Severed on consent....
10-6-72	Trial cont'd.
10-10-72	Trial cont'd.
10-11-72	Trial cont'd.
10-12-72	Trial cont'd.
10-13-72	Trial cont'd.
10-16-72	Trial cont'd.
10-17-72	Trial cont'd. COUNTS 2,5,6,12,13,24 thru 30 AND 40 DISMISSED on consent.
	(Cont'd on nex page)

DATE	PROCEEDINGS
10-18-72	trial cont'd. COUNTS 3 & 11 dismissed as to RICHARD GREENBERG....
10-19-72	Trial cont'd. & concluded....A.Soldano GUILTY on cts.1,15..NOT GUILTY 3,4,11,37.. G.FREDERICK-Guilty on ct.1 Not Guilty on count 37....Richard Greenberg GUILTY on cts.1 & 15..Not Guilty counts 4,37...Pre-sentence report ordered ALL deft. Sentenced on Nov.30, 1972 Bail cont'd...Knapp,J...
11-6-72	MICHAEL HELLERMAN-Filed Judgment(Atty.present)It is adjudged that imposition of sentence be suspended and the deft is placed on probation for a period of FIVE(5)YEARS to be served CONSECUTIVELY and not concurrently with the sentence imposed under 70Cr.967, the period of said probation to commence at the expiration of the custody served under 70Cr.967. The probation so imposed shall be subject to the standing probation order of this Court and to the special conditions that 1) the deft shall not engage in the securities business or act as an advisor to any one other than the members of his immediate family 2) the deft shall make available a fund of $12,500.00. to be used towards the restitution of his victims to the extent that they can be identified and in accordance with a plan of xxxx restitution to be approved by his Probation Officer. Open counts 1 through 14 and 16 through 40 are dismissed on motion of deft.....Lasker,J.
11-28-72	Dioquardi & Ostrer - Filed govt's affidavit and notice of motion for an order to sequester the jury at the trial.sf
11-30-72	ANTHONY SOLDANO-Filed Judgment(atty.present)deft is committed to custody of the Atty. Gen.for imprisonment for a period of TWO YEARS on ct.15. Imposition of sentence is suspended on Ct.1, deft is placed on probation for a period of THREE YEARS, subject to the standing probation order of this Court. Probation to commence upon expiration of confinement. The deft is cont'd on present bail until 12-11-72 at 10 a.m. at which time the deft is to surrender to the U.S.Marshal...Knapp, J.
11-30-72	GARY FREDERICKS -Filed Judgment(Atty.present)the Imposition of sentence is suspended. Deft is placed on Probation for a period of TWO YEARS, subject to the standing probation order of this Court..Knapp, J.

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DATE	PROCEEDINGS
11-30-72	RICHARD GREENBERG -Filed Judgment(atty.present)deft is committed to the custody of the Atty.Gen.for imprisonment for a period of THIRTY DAYS on count 15. Imposition of sentence is suspended on ct.1, deft is placed on probation for a period of TWO YEARS, subject to the standing probation order of this Court. Probation to commence upon expiration of confinement. Deft is cont'd. on present bail until Jan.2,1973, at 10 a.m. at which time the deft is to surrender to U.S.Marshal...Knapp, J.
2-1-72	Dioguradi- Filed affidavit of Jay Goldberg, atty. for deft.
12-1-72	SOLDANO - Filed notice of appeal to the USCA for the 2nd Circuit from judgment 11-30-1972 (mailed copies to US Atty's office and defendant.)
12-6-72	Soldano- (atty. present) Motion for bail pending appeal. Denied.Deft' motion to extend time of surrender until 1-3-73 at 10:00 A.M.-GRANTED Knapp, J.
12-6-72	Richard Greenberg - Filed notice of appeal to the USCA for the 2nd Circuit from judgment entered 11-30-72 - leave to appeal in forma pauperis is hereby granted - Knapp, J. (mailed copies to deft. and US Atty's office.)
-11-72	Hallerman- Filed affidavit and notice of motion requiring the Govt. to produce list of all cases investigated or under investigation relating solely to the conduct of M. Hallerman,copies of indictments where he is or was a co-conspirator participant. etc.
12-14-72	Filed Transcript of record of proceedings, dated 10-19-72
12-14-72	Filed Transcript of [illegible] 11-8-72
12-19-72	Filed Goverments trial memorandum
12-[illegible]-72	Filed Transcript of record of proceedings dated 10-13,16,17,19-1972
12-20-72	Dioguardi & Ostrer-Filed Govt's affidavit in opposition to Dioduardi bail application.
12-20-72	Dioguardi & Ostrer-Filed Govt's memorandum of law in connection with motion for discovery.
12-20-72	Dioguardi & Ostrer-Filed Govt's memorandum of law in connection with cross-examination of deft. Ostrer.

DATE	PROCEEDINGS
1-2-73	Dioguardi-Filed affidavit , to waive right of seeking mistrial,etc.
1-2-73	Oster- Filed affidavit and notice of motion for saverance.
1-2-73,	Oster- Filed memorandum of law in behalf of deft's motion.
12-27-72	Dioguardi & Oster-Filed affidavit for writ of habeas corpus. writ issue 73
12-29-72	Dioguardi-Filed affidavit by AUSA Andrew Schaffer.
1-4-73	Ostrer-Filed memo endorsed on motion for severence, Motion denied, Edels
1-8-73	Filed order-Dr. Luis Blitzman M.D. be employed to make such examination of John M. Kelsey to determine his physical ability to appear as a witness & said physician submit to the court a report as to Mr. Kelsey's abilit Mr. John M. Kelsey submit himself to exam. by said physician at such ti & place as hall be specified by said physician.--The U.S. Atty be direc to pay a reasonable fee for the services.not to exceed the sum of $200.00---Edelstein, J.
1-10-73	Filed CJA Form 20 approving payment to Abraham Solomon, Esq. in rep'ing def. RICHARD GREENBERG, signed by Knapp, J. and countersigned by Friend CCA 2d.
1-11-73	Soldano-Filed notice that the record on appeal has been certified and tr to the U.S.C.AA
1-4-73	Jury trial begun before Edelstein,Ch.J. as to defts. Dioguardi and Ostre Deft. Dioguardi produced on a writ.
1-5-73	Trial continued.
1-8-73	Trial continued.
1-9-73	Trial continued.
1-10-73	Trial continued.
1-11-73	Trial continued.
1-15-73	Trial continued.
1-16-73	Trial continued.
1-17-73	Trial continued.
1-18-73	Trial continued.
1-22-73	Trial continued. (over)

DATE	PROCEEDINGS
1-23-73	Trial continued.
1-24-73	Trial continued.
1-25-73	Trial continued.
1-26-73	Trial continued and concluded. DIOGUARDI-Jury Verdict: Guilty on counts
	1,16,17 and 31.
	Mistrial on counts 9,13,14,15,18,19,28,29,32,33,34,35,3
	38 and 39.
	Motion to dismiss granted as to counts;2,3,4,5,6,7,8,10
	11,12,20,21,22,23,24,25,26,27,30,37 and 40.
	OSTERER-Jury Verdict; Guilty on counts1,9,16,17,18,19,3
	33,34,35 and 36.
	Not Guilty on counts 14,15,29,32,38 and 39.
	Counts Dismissed;2,3,4,5,6,7,8,10,11,12,13,20,21,22,23,
	24,25,26,27,28,30,37 and 40.
	Pre-sentence investigations ordered. Sentences adjourned to 3-13-73 at
	10 A.M. Ostrer bail continued as present. Dioguardi produced on writ.
	Serving prison term. Edelstein,Ch.J.
1-29-73	Filed the following papers received from chambers this date.
	Trial memo. in behalf of deft. Osterer.(2)
	Filed affidavit of deft. Osterer.
	Filed annotated indictment.
	Sealed envelope containg Ex.18 ordered sealed 1-24-73.
2-5-73	Soldano-Filed txx U.S.C.A. order that the arguement of the appeal be
	heard during the week of April 16,1973. Fusaro U.S.C.A. CLK.
2-15-73	Dioguardi & Ostrer-Filed one manilla envelope ordered sealed and placed
	in vault rm 602. Edelstein,CH.J.
2-15-73	Dioguardi & Ostrer-Filed one manilla envelope ordered sealed and placed
	in vault rm. 602. Edelstein,CH.J.
2-15-73	Soldano-Mailed voucher 1 of the CJA appointing court reporters approved.
	dtd. 11-3-72. Knapp,J.
2-15-73	Fredricks-Mailed voucher 1 of the CJA appointing court reporters approve
	dtd. 11-3-72. Knapp,J.

OVER

DATE	PROCEEDINGS
2-15-73	Fredericks-Filed CJA mailed copy 1 to the A.O. approved (with memorandu Knapp,J.
2-15-73	Fredricks-Mailed CJA form 5 approved sent to the A.O. Wash. D.C., Knapp
[illegible]	Filed Petition for Writ of Habeas Corpus Writ [illegible] - 1/22/73
3-6-73	Dioguardi-Filed letter dtd. 3-6-73 to Edelstein,CH.J. on a juror of m competentcy by Dr. Arnold H. Zucker.
3-6-73	Dioguardi-Filed affidavit and notice of motion for an order granting th deft a new trial.
3-1-73	Greenberg, Soldano-Filed true copy of C.A. order affirming the D.C.Judgm as to deft Greenberg. Judgment Entered 3-1-73 Thomas E. Andre acting-Clerk
3-5-73	~~[illegible] of record of proceedings~~ 12/20/72.
3-12-73	LOUIS OSTRER - Filed afdvt.of Maurice Edelbaum of actual engagement, with memo endorse GRANTED - No opposition...Edelstein,Ch.J.
3-12-73	JOHN DIOGUARDI ~~LOUIS OSTRER~~ - Filed letter from Jay Goldberg dtd. 3-9-73 consenting to the above afd
3-12-73	Dioguardi-Filed Govt's affidavit for a writ of habeas corpus,ret 3-12-73
3-12-73	Oster-Filed affidavit and notice of motion for a new trial.
3-12-73	Oster-Filed Government's affidavit in opposition of motion for a new tria
3-14-73	J.DIOGUARDI) L. OSTRER) Filed Govts memorandum in connection with sentencing....
3-13-73	Dioguardi-Filed affidavit for a writ of habeas corpus writ iss ret 3-19 &
3-16-73	RICHARD GREENBERG-Filed true copy of U.S.C.A. order-Ordered that a stay be and it hereby is granted pending argument of the motion for a stay pending appeal on Jan. 9, 1973 before a panel of this Court. mailed notices 3-19-73.
3-20-73	Ostre & Dioguardi-Hearing & held & concluded re-motions by both counsel Hearing adjd to April 12,1973 Decision reserved. Edelstein,CH.J.

CONT'D

DATE	PROCEEDINGS
3-23-73	Louis Ostrer-Filed motions for, Judgment of acquittal, order setting aside conviction and granting new trial.
3-23-73	Louis Ostrer- Filed memo endorsed on motions dtd 3-23-73, Motion denie after agrument. Edelstein, CH.J.
3-26-73	Dioguardi & Ostrer-Filed one manilia envelope containing transcript ordered sealed and impounded in the vault of the Clerk's office room 602. Edelstein, CH.J.
4-4-73	Filed Transcript [illegible] Proceedings, dated 1-23, 24, 25, 26, 1973
4-6-73	Soldano, ~~[illegible]~~, Greenberg-Filed true copy of C.A. order (~~with Opin attached~~) upon default on not having filed his brief and appendix it is ordered that the appeal of Anthony Soldanp from the judgment of the U.S.D.C. be dismissed
4-10-73	Goodman-Filed memo ordered sealed & impounded this date rm 602. Lasker,
4-12-73	Ostrer-Filed memo endorsed on motion dtd 3-12-73 for new trial, Motion for a new Trial is denied in all respect opinoon to foll Edelstein CH.J.
4-12-73	Dioguardi-Filed memo endorsed on motion dtd 3-12-73 for new trial Motion for a new trial is denied in all respects opinion to follow. Edelstein, CH.J.
4-10-73	F. Goodman-Filed Judgment (atty. present) It is adjudged that impositio of sentence is suspended and the deft. is paleced on unsupervised probation for a period of Five(5) Years to run concurrently with 70 Cr 967 and 72 Cr 1111. Counts 2 thru 40 dismissed. (entered 4-1373) Lasker, J.
4-11-73	JOHN DIOGUARDI-Filed affdvt of H.F.McGuire for a writ of habeas corpus-Writ issued t Warden, Federal Correctional Inst. at Danbury Conn. Ret.-4-12-73.
4-12-73	JOHN DIOGUARDI-Filed Judgment (Atty.present, deft produced on a Writ)(#73, 384) Deft is committed for imprisonment for a period of FIVE YEARS & FINED $10,000 on count 1. TWO YEARS & FINED $10,000 on each of counts 16 & 17. Prison sentence on counts 1,16 & 17 to run consecutively to each other and consecutively to and to begin upon expiration of sentence deft is presently serving at U.S.CORRECTIONAL INSTITUTION, Danbury, Connecticut. Total fines of $30,000 on cts.1,16 & 17 to be paid or deft to stand committed until the fines are paid or he is otherwise discharged according to law. Five Years & fined $1,000. on count 31. Execution of prison sentence on count 31 suspended. Deft placed on probation for a period of FIVE YEARS, to commence upon expiration of confinement imposed on cts.1,16 & 17, subject to the standing probation order of thisE Court. Payment of $1,000 fine on ct.31 is Remitted.... Edelstein, Ch.J.... Entered 4-16-73

— See over —

DATE	PROCEEDINGS
4-12-73	LOUIS OSRER - Filed Judgment(# 73,383)Deft is committed for imprisonment for a period of THREE YEARS on each of counts 1,9,31,33,34 & 35 to run concurrentlyz wit each other. TWO YEARS on each of counts 16,17,18 & 19 to run concurrently with each other and concurrently with sentence imposed on counts 1,9,31,33,34 and 35. Fines $10,000 on each of cts.1,16,17,18 & 19 & $5,000 on count 9. Total fines of $55,000 to be paid or deft to stand committed until the fines are paid or he is otherwise discharged according to law....Five Years on count 36. Execution of sentence on cou 36 suspended. Deft placed on probation for a ~~perioo~~ period of ONE DAY to commence upon expiration of confinement imposed on counts 1,9,16,17,18,19,31,33,34,35 & 36. Deft cont'd on present bail until 4 P.M. April 13,1973 at which time he is to post a $25,000 unsecured P.R.B. pending appeal. Deft's bail limited to continental United States......Edelstein,Ch.J.........Entered 4-16-73---
4-13-73	John Dioguardi- Filed notice of appeal to the USCA for the 2nd Circuit from judgment filed 4-12-73 (copies mailed to defendant, Attorney for deft. and US At
4-19-73	Filed Transcript of record of proceedings, dated JAN. 4, 5, 8, 9, 10-73
4-19-73	Filed Transcript of record of proceedings, dated JAN. 11, 12, 15, 16, 17, 22, 23, 1973
4-12-73	LOUIS OSTRER-Filed Unsecured Personal Recognizance Bond Pending Appeal in the amoun of $25,000.00---Clerk.
4-19-73	FRED GOODMAN-Filed CJA 4 copy 1 approving payment to D.Blackstone--dtd.4-12-73-Laske ---
4-19-73	Filed Transcript of record of proceedings, dated 12/6/72 -
4-19-73	Filed Transcript of record of proceedings, dated 12/11/72
4-13-73	LOUIS OSTRER- Filed notice of appeal to the U.S.C.A. for the 2nd Circuit from judgment filed on 4-12-1973 (mailed copies to deft. and U.S. Attr.)
4-19-73	John Dioguardi-Filed writ of habeas corpus with Marshal's return dtd
4-19-73	John Dioguardi-Filed writ of habeas coppus with Marshal's return, wri fied. Edelstein,CH.J.
4-19-73	John Dioguardi-Filed writ of habeas corpus with Marshal's return,dtd writ satisfied Edelstein,CH.J.
5-9-73	Caricato-Filed notice of appearance by atty Frederick H. Block 295 Mad AVe New York 10017 685-1161
5-9-73	John Dioguardi - Filed Commitment & entered return, Deft. Delivered to the FCI Danb Conn
5-15-73	MICHAEL CARICATO - Filed afdvt. & notice of motion to dismiss the indictment...
5-15-73	MICHAEL CARICATO - Filed deft's memorandum in support of motion to dismiss..
**12-6-72	Filed Govt's bill of particulars.
5-17-73	Ostrer-Filed affidavit and motion for a bill of particulars and disco and inspection.
5-17-73	Ostrer-Filed memorandum of law in support of motion for particulars e
5-17-73	Hellerman-Filed motion dtd 9-22-71 to withdraw the pre-trial motion f 9-1-71.
5-17-73	Filed Govt's proposed examination of prospective jurors dated in Janu
5-17-73	Dioguardi-Filed deft request to charge dated 1-18-73.
5-17-73	Soldano-Filed transcript of record of proceedings dated 4-12-73.

CRIMINAL DOCKET

DATE	PROCEEDINGS
5-24-73	Caricato- Filed reply affidavit.
5-24-73	Caricato- Filed deft's reply memorandum in support of to dismiss indct.
5-25-73	Caricato-Filed Govt's memorandum of law in opposition to motion to to dismiss indictment.
6-14-73	~~Filed~~ Transcript of record of proceedings, ~~dated~~ March 22, 1973.
5-18-73	Dioguardi and Osterer- Filed notice to docket clerk that the record has been certified and transmitted to the U.S.C.A. on 5-18-73
JUN 26-73	~~Filed~~ Transcript Arraignment proceedings, ~~dated~~ ; JAN 4-73
7-9-73	ANTHONY SOLDANO. ~~Filed~~ Commitment & entered return, Deft. Delivered to the Federal Detention Hdqtrs., N.Y., N.Y.
6-26-73	Filed notice-The supplemental record on appeal has this date been certified and transmitted to the U.S.C.A.
7-18-73	JOHN DIOGUARDI and LOUIS OSTRER-Filed OPINION #39,684-I do not believe that the facts justify the reopening of the jury's verdict. Defts. have not offered any evidence of a separate, unrelated determination of mental incompetency. Defts' second request that the verdict be set aside even without a hearing is utterly without foundation. A showi which is too weak to permit an inquiry into the jury's deliberations is, a fortiori, to weak to warrant a new trial. Accordingly, defts. motion is denied. So Ordered- -- Edelstein, J. Mailed notices 7-18-73.
7-18-73	MICHAEL CARICATO-Filed memo endorsed on motion filed 5-15-73 to dismiss.-Upon hearing motion denied. See transcript of July 17, 1973 for findings of fact and conclusions of law---Edelstein, Ch. J. Mailed notices 7-19-73.
7-19-73	Filed Gov't affdvt in opposition to deft's Caricato motion to dismiss
7-20-73	JOHN DIOGUARDI & LOUIS OSTRER-Filed one envelope containing motion for a new trial Documents sealed by order of the Court--Edelstein, Ch.J.

DATE	PROCEEDINGS
-25-73	MICHAEL CARICATO-(atty present) Deft. withdraws his plea of not guilty and pleads guilty to count 1 only. Sentence adjourned to Oct. 2 1973 at 2:30 p.m. P.S.I. ordered. Form C/R signed by deft. & counsel. Probation Dept. notified. Cont'd on R.O.R.---Edestein, Ch J.
8-1-73	Filed Transcript of record of proceedings dtd 12-20-72
8-16-73	Filed Transcript of proceedings dtd Mar 8 1972
9-28-73	Filed transcript of record of proceedings dated July 25, 1973
10-2-73	MICHAEL CARICATO = /Judgment #73,345 Imposition of sentence is suspended and the Deft is placed on Pr for a period of ONE (1) YEAR subject to the standing probation order of this court, and fined $2500.00 to be paid within TWO (2) YEARS or he is otherwise discharged according to law. Payments of the fine can be arranged with the Prob. Office. Defts motion to dismiss Cts 2 thru 40 Granted, on objection by Gov't. - Edelstein, CJ.
9-29-73	MICHALE HELLERMAN = Filed amended Judgment & Order of Probation; It is adjudged that imposition of sentence be suspensed and the Deft is placed on probation for a period of FIVE (5) years be be served consecutively to and not concurrently with the sentence im under 70Cr 967 the period of said probation to commence at the expiration of the custod served under 70 Cr 967. The probation so imposed shall be unsupervised. The Deft shall engage in the securities business or act as an advisor to any other than the members of his immediate family and the Def't shall make available a fund of $12,500.00 to be used towards the restitution of his victims to the extend that they can be indentified and in accordance with a plan of restitution to be approved by his Probation Officer. Open Cts one through 14 and sixteen through forty are dismissed on motion of Deft.- Las
9-25-73	MICHALE HELLERMAN = Filed Opinion #39856, for the reasons set forth in the affidavit of Vincent L. Broderick sworn to March 3, 1973, in support of the motion, and the argument presented orally, the motion the granted to the following extent: (1) The sentence of imprisonment under 70 Cr 967 is reduced to the period of time served to date. (2) The probation which will show now commence under 71 Cr 558 and 72 Cr 1205 shall be unsupervised. Amended judgments shall be prepared in accordance with this memorandum. It is so ordered. - LASKER, J.

DATE	PROCEEDINGS
1-18-74	JOHN DIOGUARDI= Filed Memorandum And Order regarding Deft's Bail application. Accordingly, Deft's application for Bail is denied- SO ORDERED—EDELSTEIN,C.J
1-18-74	JOHN DIOGUARDI= Filed Defts Notice of Motion and Affidavit for the fixation of bail, and for such other and further relief as may be appropriate.
1-18-74	JOHN DIOGUARDI= Filed Gov't Memorandum Of Law in opposition to the Deft's motion for Bail application.
1-18-74	[illegible] OGUARDI= Filed Gov't Affidavit of S. Andrew Schaffer, A.U.S.A., in [illegible] to Deft's Bail application.
3-14-74	[illegible] GUARDI= Filed U.S.C.A. MANDATE with OPINION attached — The Judgment [illegible] District Court is affirmed - Judgment entered 3-14-74 - CLERK.(Mailed Notice)
6-5-74	JOHN DIOGUARDI-Filed transcript of record of proceedings dated 1-14-74
7-25-74	LOUIS OSTRER-Filed Govt's, affidavit and notice of motion to require deposit of fines or posting of bond pending appeal ret. 8-2-74.
8-2-74	LOUIS OSTRER-Filed Deft's. reply affirmation in opposition to Govt's. motion dated 7-25-74.
8-8-74	LOUIS OSTRER-Filed Gov't reply affdvt Re: motionfor payment of fines.
9-10-74	LOUIS OSTRER-Filed Stipulation of Payment of Fine. The Deft. will pay $1,500.00 per month for 35 consecutive months with a final payment of $2,500.00 on the 36th month. Payment is to be by certified check or money order made payable to the Treasurer of the United States, Such payments are to satisfy criminal fine of $55,000.00 imposed on 4-12-73. Initial payment to be received on or before 9-5-74 and subsequent payments are due on the 5th day of each succeeding month. ......So Ordered.....Edelstein,Ch.J.
11-11-74	JOHN DIOGUARDI-Filed true copy of U.S. Supreme Court Mandate. The petition for a writ of certiorari is denied. (mailed notice)
11-11-74	Filed letter from the U.S. Court of appeals that the mandate issued on 3-12-74 should now be construed as applying to appellant Louis Ostrer.
11-11-74	LOUIS OSTRER-Filed true copy of U.S. Supreme Court Mandate. The petition for a writ of certiorari is denied.
11-19-74	LOUIS OSTRER-Filed transcript of record of proceedings dated 8-15-74.
12-11-74	LOUIS OSTRER-Filed deft's. notice of motion to admit to bail, ret. 12-16-74.
12-11-74	LOUIS OSTRER-Filed deft's. affidavit in support of notice of motion to admit to bail
12-11-74	LOUIS OSTRER-Filed deft's. memorandum in support of motion to continue petitioner on bail or to admit him to bail.
12-11-74	LOUIS OSTRER-Filed deft's. notice of motion for new trial and for evidentiary hearing, ret. 12-16-74.

Cont'd. on Page #17

Ferris 71 Cr 558 Page 016

DATE	PROCEEDINGS
[illegible]	[illegible] 100 -
[illegible]	Escrow 100 -
[illegible]	[illegible] -
[illegible]	[illegible] 100 -
[illegible]	[illegible] -
[illegible]	[illegible] 100 -
[illegible]	[illegible] 100 -
[illegible]	[illegible] 100 -
[illegible]	[illegible]
[illegible]	[illegible] -
[illegible]	Ostrer [illegible]
[illegible]	Escrow 1500
[illegible]	Ostrer L. 1000 -
[illegible]	Escrow 1000 -
3/24/75	Ostrer L. 1000 -
3/25/75	Escrow 1000 -
4/22/75	Ostrer L 1500 -
4/24/75	O Escrow 1500 -
5/22/75	Ostrer L. 1500 -
5/27/75	O Escrow acct 1500 -
6/24/75	Ostrer L 1500 -
6/26/75	O Escrow 1500 -
7/25/75	Ostrer 1500 -
7/29/75	Escrow 1500 -
8/13/75	Ostrer 1500 -
8/14/75	Escrow 1500
10/13/75	Ostrer 1500 -
10/17/75	Escrow 1500 -
11/14/75	Ostrer L 1500 -
11/13/75	Escrow acct 1500 -

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ATE	PROCEEDINGS	Date Order Judgment N
-11-74	LOUIS OSTRER-Filed deft's. affidavit in support of motion for new trial (on Fifth Amendment ground).	
-11-74	LOUIS OSTRER-Filed deft's. affidavit in support of request for evidentiary hearing & motion for new trial (Fourth and Sixth Amendment Grounds).	
-11-74	LOUIS OSTRER-Filed deft's. memorandum in support of request for evidentiary hearing on motion for new trial.	
-16-74	Deft's. Louis Ostrer motion to admit to bail - Denied. Motion to stay surrender of sentence Denied. Deft. ordered to surrender for service of sentence on Dec.17,1974 at 10:30 in Marshal's Office. Marshal's Office notified...Edelstein,Ch.J.	
-18-74	LOUIS OSTRER-Filed deft's. notice of appeal from the order denying bail,,dated Dec,16,1974. Mailed notice to Louis Ostrer, 427 West St.N.Y.C. 10014 and U.S. Attorney's Office,	
-18-74	LOUIS OSTRER-Filed OPINION #41601-Deft's. motion to admit to bail is denied. The motion for a new trial will be decidediin due course. SO ORDERED.....Edelstein,Ch.J. (mailed notice)	
-18-74	MORRIS WINTER-Filed Nolle Prosequi.......Edelstein,Ch.J.	
-26-74	LOUIS OSTRER-Filed affidavit of Julius November in support of deft's. motion for a new trial.	
-26-74	LOUIS OSTRER-Filed affidavit of Marjorie RICHARDSON in support of deft's. motion for a new trial.	
-26-74	LOUIS OSTRER-Filed affidavit of Maurice Edelbaum in support of deft!s. motion for a new trial.	
-26-74	LOUIS OSTRER-Filed affidavit of Richard E. Wynn in support of deft's. motion for a new trial.	
-26-74	LOUIS OSTRER-Filed deft's. affidavit in support of his motion for a new trial.	
-26-74	LOUIS OSTRER-Filed affidavit of Clarence B. Jones in support of deft's. motion for a new trial,	
-26-74	LOUIS OSTRER-Filed Govt's. affidavit in opposition to deft's. motion for a new trial.	
-26-74	LOUIS OSTRER-Filed Govt's. memorandum of law in opposition to deft's. motion for a new trial.	
-31-74	LOUIS OSTRER-Filed affidavit of Harvey A. Silverglate in connection with deft's. pending motion for a new trial and for an evidentiary hearing.	
-31-74	LOUIS OSTRER-Filed deft's. reply memorandum on wiretap issue.	
-31-74	LOUIS OSTRER-Filed affidavit of Julius November in reply to Govt's. opposition.	
-8-75	LOUIS OSTRER-Filed affidavit of Maurice Edelbaum, re: telephone conversations with Mr. Moss & deft.	

DATE	PROCEEDINGS
1-13-75	LOUIS OSTRER-Filed true copy of U.S.C.A. mandate. Deft's. motion dated 12-17-74 to continue bail pending determination by the U.S.District Court for the S.D.N.Y. for a motion for a new trial is granted. It is further ordered that bail will continue for 24 hours after a decision by the U.S. District Court on the motion for a new trial or until the next panel of this court is available to hear any subsequent bail application, whichever is the later of those two dates. (mn)
1-24-75	LOUIS OSTRER-Filed Govt's. reply memorandum of law.
1-24-75	LOUIS OSTRER-Filed Govt's. affidavit by John Fine.
1-24-75	LOUIS OSTRER-Filed Govt's. supplemental affidavit by Harold F. McGuire, Jr.
1-24-75	LOUIS OSTRER-Filed deft's. notice of motion for production of tapes, logs, memoranda and other documents relating to monitored conversations.
1-24-75	LOUIS OSTRER-Filed affidavit of Alan M. Dershowitz in support of deft's. motion for production.
1-24-75	LOUIS OSTRER-Filed deft's. memorandum of law in support of motion for production.
1-24-75	LOUIS OSTRER-Filed affidavit of Seymour Greenfield in support of deft's. motion for production.
1-24-75	LOUIS OSTRER-Filed affidavit of Julius November in support of deft's. motion for production.
1-24-75	LOUIS OSTRER-Filed deft's. memorandum in rebuttal to Govt's. reply memorandum and supplemental affidavits.
2-11-75	JOHN DIOGUARDI-Filed deft's. affidavit & notice of motion for reduction of sentence, ret. 2-25-75.
2-11-75	LOUIS OSTRER-Filed deft's. notice of motion for reduction of sentence.
2-11-75	LOUIS OSTRER-Filed deft's. affidavit in support of motion for reduction of sentence.
2-13-75	LOUIS OSTRER-Filed affidavit of Harvey A. Silverglate in support of deft's. motion for a new trial.
2-18-75	LOUIS OSTRER-Filed deft's. supplementary memorandum in support of motions for an evidentiary hearing & production.
2-18-75	LOUIS OSTRER-Filed deft's. affidavit in support of motions for production, a new trial & for an evidentiary hearing.
2-24-75	Filed transcript of record of proceedings dated 12-16-74.
2-28-75	Filed Gov'ts. Reply Memorandum of Law.
3-7-75	LOUIS OSTRER-Filed deft's. affidavit in support of motion for a new trial.
3-17-75	LOUIS OSTRER-Filed deft's. notice of motion for leave to file rebuttal memorandum
3-17-75	LOUIS OSTRER-Filed deft's. notice of motion for leave to filed affidavit of counsel

Cont'd. on Page #19

DATE	PROCEEDINGS
3-17-75	LOUIS OSTRER-Filed affidavit of Harvey A. Silverglate.
3-17-75	LOUIS OSTRER-Filed deft's. memorandum of law in rebuttal to Govt's. reply memorandum.
3-17-75	LOUIS OSTRER-Filed certificate of service of motions by Harvey A. Silverglate, on 3-13-75.
3-21-75	LOUIS OSTRER-Filed deft's. motion for leave to file affidavit & memorandum.
3-21-75	LOUIS OSTRER-Filed affidavit of Harvey A. Silverglate, concerning wiretaps on deft's. telephone.
3-21-75	LOUIS OSTRER-Filed deft's. memorandum concerning 4th Amendment defects in wiretap application.
3-21-75.	LOUIS OSTRER-Filed certificate of service of affidavit & memorandum by Harvey A. Silverglate on 3-19-75.
4-11-75	LOUIS OSTRER-Filed Deft's. motion for leave to file motions.
4-11-75	LOUIS OSTRER-Filed Deft's. renewal of motion for production of tapes, logs, memoranda and other documents relating to monitored conversations.
4-11-75	LOUIS OSTRER-Filed deft's. motion for order respecting preservation of wiretap and eavesdrop tapes.
4-11-75	LOUIS OSTRER-Filed affidavit of Harvey A. Silverglate in support of deft's. motions
4-11-75	LOUIS OSTRER-Filed certificate of service of Harvey A. Silverglate, of the motions and affidavit on 4-9-75.
6-5-75	JOHN DIOGUARDI-Filed OPINION #42537 - Deft's. motion for reduction of sentence is denied........Knapp,J. (mailed notice)
6-16-75	JOHN DIOGUARDI-Filed deft's. notice of appeal from the order of 6-5-75 denying Rule 35 relief. Mailed notice to: John Dioguardi, P.O. Box 1000, Lewisburg,Pa. and U.S. Attorney's Office.
7-24-75	Filed transcript of record of proceedings dated 5-14-75.
8-11-75	Filed Envelope containing orders of the Court. Ordered sealed by Judge Lasker and placed in vault in Room 602. (Filed in 70 Cr. 967)
10-8-75	LOUIS OSTRER-Filed OPINION #43223 - Oral order of this Court dated 3-20-73 is modified to permit issuance of a subpoena duces tecum to Flower-Fifth Avenue Hospital for certain records of Miss Genena Rush. The U.S. Attorney and counsel for deft. shall be permitted to listen to certain tapes now in possession of Asst. District Attorney, N.Y.County which include conversations between deft. and Maurice Edelbaum, Julius November, Henry Boitel and Richard Wynn.......Brieant (mailed notice)
10-21-75	JOHN DIOGUARDI-Filed CONSENT ORDER dismissing the appeal from the Order of Judge Knapp denying Rule 33 relief........Knapp,J.

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DATE	PROCEEDINGS
11-18-75	Filed one sealed carton contents ordered impounded, sealed and placed in vault in Rm. 602. Brieant, J.
12-19-75	Filed one sealed manila envelope containing hospital records ordered impounded, sealed and placed in custody of cashier. Brieant, J.
12-22-75	LOUIS OSTRER - Filed Order that the tapes directed by me to be placed in the safe of the Clerk of this court be delivered to A.U.S.A. Lawrence B. Pedowitz against his receipt therefor. Brieant J. Rec'd Lawrence B. Pedowitz 12-19-75.(mailed notice)
1-7-76	LOUIS OSTRER - Filed Gov'ts. Notice of Default
1-7-76	JOHN DIOGURADI - Filed Notice of Motion for a new trial on the ground of newly discovered evidence. Ret. 1-19-76.
1-7-76	JOHN DIOGUADI - Filed Memo. End. on motion dtd. 1-7-76. motion is respectfully referred to Judge Brieant Jr. with his consent. Edelstein Ch. J. (mailed notice)
3-1-76	JOHN DIOGURADO - Filed 2nd Memo. End. on motion dtd. 1-7-76, for a new trial. Motion denied....... Brieant J. (mailed notice)
03-11-76	LOUIS OSTRER, - Filed Gov'ts. Notice of Default.
3-15-76	LOUIS OSTRER-Filed manila envelope containing tapes ordered sealed, impounded and placed in cashier's office. Brieant, J.
3-18-76	LOUIS OSTRER - Filed Defts. Memorandum of Fact & Law in support of motion for a new trial.
3-31-76	LOUIS OSTRER - Filed Gov'ts. affdvt.in response to dfts. Post Hearing submission in support of his motion for a new trial.
3-31-76	LOUIS OSTREAR Filed Gov'ts Memorandum in response to dfts Post Hearingx submission in support of his motion for a new trial.
4-1-76	LOUIS OSTRER - Filed Gov'ts. Affdvt. by John C.Fine.
4-5-76	LOUIS OSTRER - Filed Dfts. motion for enlargement of timex which to file reply brief.
4-6-76	LOUIS OSTRER - Filed Memo. End. on motion for enlargement of time .Motion Granted. ....Brieant J. (mailed notice)
04-12-76	LOUIS OSTRER - Filed Dfts. Reply Memorandumx in support of his motion for a new trial.
04-21-76	LOUIS OSTRER - Filed Gov'ts Notice of Default.
05-27-76	LOUIS OSTRER - Filed Gov'ts Notice of Default.
6-3-76	LOUIS OSTRER - Filed letter from Attys. Silverglat Shapiro & Gertner,Boston,Mass. dtd. 1/8/76 Re: wiretap tapes ordered to be copied.
6-3-76	JOHN DIOGUARDI & LOUIS OSTRER - Filed Transcript of proceeding dtd. 2/9/76.

PROCEEDINGS

	LOUIS OSTRER - Filed Opinion #44530. Findings of Fact & Conclusions of Law following hearing on motion pur. to Rule 33FRCr.P. Dfts. Motion for a New Trial Denied, as indicated........Brieant J. (mailed notice)
7-76	LOUIS OSTRER - Filed Affdvt. by John Fine atty. of Inspector Gen. U.S.Dept. of State.
6-7-76	LOUIS OSTRER - Filed Supplemental Affdvt. by Harold F. McGuire Jr. in response to dfts. reply memorandum & affdvt. of Julius November filed 12/31/74.
6-7-76	LOUIS OSTRER - Filed Gov'ts. Reply Memorandum of Law.
6-7-76	LOUIS OSTRER - Filed letter to Judge Brieant from U.S.Dept. of Justice, U.S Atty. Office, SDNY dtd. 4-19-76/
6-7-76	LOUIS OSTRER - Filed Affdvt. of Louis Ostrer in support of motion for production of tapes, Logs, Memoranda & Other Documents relating to monitored conversation & the motion for a new trial & for Evidentiary Hearing.
6-21-76	LOUIS OSTRER - Filed Dfts. Notice of Appeal from order denying a New Trial dtd. 6-4-76. (mailed notice)
7-5-76	LOUIS OSTRER - Filed Transcript of proceeding dtd. 3-1,3.4,76.
8-5-76	Filed stipulation re substitution of documents to record on appeal
8-5-76	LOUIS OSTRER- Filed Notice of Supplemental Certification of record to the USCA.
7-20-76	LOUIS OSTRER - Filed Notice of Certification of Record to the USCA.
11-3-76	LOUIS OSTRER - Filed Dfts. Notice of Motion for Order to Show Cause. ret. before Judge Brieant. Ret. Sine Die.
1-3-76	LOUIS OSTRER - Filed Dfts. Memorandum regarding bail.
1-3-76	LOUIS OSTRER - Filed Memorandum & Order. For Reasons as indicated, all relief on the motion is denied.....Brieant J. (mn)
11-22-76	LOUIS OSTRER - Filed Dfts. Notice of Appeal from Order dtd. 11-3-76. (mn)
1-3-76	LOUIS OSTRER - Filed letter dtd. 11-2-76 from U.S.Atty. SDNY to Judge Brieant. Re: Response to Dfts. memorandum regarding the effect of the issuance of the mandate in this case by the Second Circuit.
11-1-76	LOUIS OSTRER - Filed True Copy of USCA Mandate. Order Appealed from is affirmed & the mandate shall issue forthwith.....Judges Ct. Lumbard, Mulligan & Gurfein CJJ. Judgment Ent. 11-1-76 Clerk. Mdt. 12-1-76. (mn)
12-02-76	LOUIS OSTRER - Filed Dfts. Notice of Motion to re-open evidentiary hearing on motion for a new trial or in the alternative, motion to vacate sentence pur. to 28 U.S.C. 2255, & supporting affdvt.
-02-76	LOUIS OSTRER - Filed Notice of Request for Order to Show Cause Regarding enlargement on bail.

DATE	PROCEEDINGS
1-13-77	LOUIS OSTRER - Filed Govts. Affdvt. relating to motion for a new trial.
2-7-77	LOUIS OSTRER - Filed letter to Judge Brieant from U.S.Atty.,SDNY dtd 1-10-77. Re: Dfts. status ,Motion to Reopen the Evidentiary Hearing in this matter.
2-10-77	JOHN DIOGUARDI - Filed U.S.Atty Notice of Motion to Dismiss Cts. 9,13-15,18,19,28, 29,32-36,38 & 39 of this indictment.
2-10-77	GARY FREDERICKS - Filed Order that the remaining Counts 3 & 11 are dismissed by the Court.....Knapp J.
2-17-77	LOUIS OSTRER - Filed Dfts. Notice of Motion to Re-open Evidentiary Hearing & for Production of Certain Govt. Files. Ret. 2-23-77.
2-17-77	LOUIS OSTRER - Filed Dfts./Movant's Memorandum of Law in support of Motion to Re-Open,etc.
2-17-77	LOUIS OSTRER Filed Affdvt. of William Franklin Glase.
2-17-77	LOUIS OSTRER - Filed Affdvt. by Ann Lambert Greenblatt.
2-17-77	LOUIS OSTRER - Filed Supplemental Affdvt. of Michael B. Pollack.
2-18-77	LOUIS OSTRER - Filed Dfts. Movants Supplementary Memorandum in support of motion to reopen evidentary hearing & for the production of certain records.
2-18-77	LOUIS OSTRER - Filed Dfts. Notice of Supplemental Motion for discovery.Ret.2-23-77.
2-18-77	LOUIS OSTRER - Filed Affdvt. of Ann Lambert Greenblatt .
2-23-77	JOHN DIOGUARDI - Filed Memo End. on motion dtd. 2-10-77. Motion Granted upon consent ......Edelstein Ch. J.(mn)
3-1-77	Filed transcript of record of proceedings dated 11-1-76
3-1-77	Filed transcript of record of proceedings dated 11-22-76
3/4/77	LOUIS OSTRER - Filed Govts. Notice of Default.
3/14/77	LOUIS OSTRER Filed Affdvt. by Bejamin Langford,Internal Revenue AGENT.
3/14/77	LOUIS OSTRER - Filed Affdvt. by Marvin Sontag Asst. Regional Commissioner,North Atlantic Region,Internal Revenue Service,etc.
3/14/77	LOUIS OSTRER - Filed Affdvt. by Hans G. Seidemann,Revenue Agent
3/14/77	LOUIS OSTRER Filed Affdvt by Gerald M. Levy Special Agent, Internal Revenue Servic
3/14/77	LOUIS OSTRER Filed Affdvt. by William I. Aronwald Special Asst. U.S. Atty.
3-30-77	LOUIS OSTRER - Filed Affdvt. of Harvey A. Silverglate in connection with dfts. motion to re open the evidentiary hearing on his new trial motion.
3-30-77	LOUIS OSTRER - Filed Affdvt. by Michael B. Pollack (Additional)
3-30-77	LOUIS OSTRER - Filed Dfts. Notice of Motion for order commanding U.S. to produce documents for inspection as indicated. Etc.
3-30-77	LOUIS OSTRER - Filed Dfts. Supplemental Memorandum of the Dft. in support of his motion to re open evidentiary hearing on new trial motion or in the alternative, for relief pur. to 28 USC 2255.

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DATE	FILINGS—PROCEEDINGS
4-5-77	LOUI OSTRER - Filed Govts. Affdavt.Re: Made availabe for inspection of M.Pollack,Esq. The Eastern District Strike force files on Rego Trading Co., Inc. & the Albert Goldstein, et al. cases.
4-5-77	LOUIS OSTRER - Filed Special Agent with internal Revenue Service Affdvt/ by Peter Paul Calarco.
4-5-77	LOUIS OSTRER - Filed Supplemental Affdvt. by William I. Aronwald at request of AUSA & in respons to papers filed by dft. to Feb. 25,1977 Affdv
4-5-77	LOUIS OSTRER - Filed Govt. Gerald M. Levy Affdvt. in order to supplement his affdvt. of 3/10/77.
4-5-77	LOUIS OSTRER - Filed Affdvt. of Hans G.Seidemann to supplement affdvt. of 2-23-77.
4-5-77	LOUIS OSTRER - Filed Govts. Benjamin Langford Affdvt. to supplement his earlier affdvt.
4-5-77	LOUIS OSTRER - Filed Govts. Memorandum of Law in support of a denial of a reopening of the evidentiary hearing.
$_c_&&	
4-6-77	LOUIS OSTRER - Filed Affdvt. by Govt. Harry Farber.
4-7-77	LOUIS OSTRER - Filed True Copy of USCA Mandate. Petition denied...dtd. 3/28/7
4-12-77	Letter from Harold F. McGuire to Mr. Silverglate.
4-12-77	Filed Letter From Harold F. McGuire to Judge Brieant.
4-12-77	Filed Letter from Lawrence R. Pedowitz to Judge Brieant.
4-12-77	Filed Letter from Harold. F. McGuire to Judge Brieant.
4-12-77	Filed Letter from Harvey A. Silverglte. to Mr. Pedowitz.
4-12-77	Filed Letter from Harvey A. Silverglate to Shira Sheindlin, Law Clerk.
4-12-77	Filed Letter from Harvey A. Silverglate to Mr. Pedowitz.
(Louis Ostrer)	The following papers are sumitted under the 28 USC. 2255 act. ~~Civil~~-#(77 Ci
4-15-77	Filed NOTICE OF REQUEST for order to show cause regarding enlargement of bail.
pl → 4-15-77	Filed DEFT'S Notice of Motion for further consideration of deft's motion for a new trial on grounds of incompetency of a juror, or, alternatively, of motion to vacate sentence pursuant to 28:2255.
4-15-77	Filed NOTICE OF MOTION to produce certain court orders and related papers.
→ 4-15-77	Filed NOTICE OF MOTION concerning further interview of Jurer's Bro. or Juror.
4-15-77	Filed NOTICE OF MOTION for production of documents.
→ 4-15-77	Filed NOTICE OF MOTION for evidentiary hearing.
4-15-77	Filed AFFIDAVIT of Harvey A. Silverglate

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USA -vs- A. Soldano et al.

All paper concerning Louis Ostrer

All Defts Affida

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
4-15-77	Filed AFFIDAVIT of Anthony Soldano	
→ 4-15-77	Filed AFFIDAVIT of Junius June Rush	
→ 4-15-77	Filed AFFIDAVIT of John McNally	
→ 4-15-77	Filed AFFIDAVIT of Richard J. Maline	
4-15-77	Filed AFFIDAVIT of Martin I. Roth	
4-15-77	Filed AFFIDAVIT of Anthony DiLorenzo	
4-15-77	Filed AFFIDAVIT of Michael B. Pollack	
4-15-77	Filed MOTION for leave to file additional Affidavit of Michael B. Pollack.	
4-19-77	Filed Deft's Affidavit of Richard H. Wynn.	
4-19-77	Filed Deft's Affidavit of MAURICE EDELBAUM.	
4-19-77	Filed Deft's Supplemental Affidavit of Harvey A. Silverglate.	
4-19-77	Filed Deft's-movant's MEMORANDUM OF LAW un support of his motion(s) for a new trial and relief pursuant to 28 U.S.C. Sec. 2255.	
4-19-77	Filed Govt's AFFIDAVIT of Harold F. McGuire, Jr. in connection with new trial motions.	
4-19-77	Filed Govt's AFFIDAVIT of Hans G. Seidemann.	
4-15-77	Filed True Copy of the MANDATE of the USCA - this appeal is dismissed as moot. Clerk. m/n.	
→ -25-77	(Louis Ostrer) Filed Govt's NOTICE OF MOTION for an order permitting the govt. to interview Junius June Rush.	
→ -25-77	(Louis Ostrer) Filed Govt's AFFIDAVIT of Richard Weinberg, in support of the motion filed above.	
-26-77	(Louis Ostrer) Filed NOTICE OF SUPPLEMENTAL MOTION to produce court orders and related papers.	
-26-77	(Louis Ostrer) Filed Affidavit of Harvey A. Selverglate	
→ -26-77	(Louis Ostrer) Filed ORDER that the Govt be permitted to interview Junius June Rush. .....BRODERICK, J.	
→ -28-77	(Louis Ostrer) Filed Deft's AFFIDAVIT of Harvey A. Silverglate in response to the affidavit of Richard Weinberg.	
-29-77	(Louis Ostrer) Filed MEMORANDUM AND ORDER - denying deft's motion for a new trial,..... Decision on Sec 2255 still pending......BRIEANT, J. m/n.	
-2-77	(Louis Ostrer) Filed Govt's MEMORANDUM IN OPPOSITION to the deft's motions for a new trial and to vacate his sentence.	
-2-77	(Louis Ostrer) Filed Govt's AFFIDAVIT of JOHN R. WING.	
-2-77	" " " " " " ROBERT G. MORVILLO.	
-2-77	" " " " " " THOMAS D. EDWARDS.	
-2-77	" " " " " " HAROLD F. MCGUIRE, JR.	
→ -2-77	" " " " " " JUNIUS JUNE RUSH.	
-3-77	(Louis Ostrer) Filed MEMORANDUM AND ORDER - the relief requested in the affidavit of Har a. Silverglate, is denied......BRIEANT, J. m/n.	

110 Rev. Civil Docket Continuation

ATE	PROCEEDINGS	Date Orde Judgment
-5-77	L. OSTRER-Fld Deft's motion for an order sequestering from this time henceforth all witnesses in this case and potential witnesses who learn of this sequestion order at a time when they know or have reason to believe that they will be witnesses inthis case...etc...ret date to be set by Court.	
5-77	L. Ostrer-Fld affdvt of H. . Silverglate co-counsel for deft...In support of sequestration Order.	
-77	L. Ostrer- Filed Notice of Motion for an order withdrwing the memo & Order denying certain of deft's motion for discovery etc..., staying the effect of the Memo & Order, setting the motions for reconsideration, etc...No ret.date given.	
-5-77	L. Ostrer- Filed Affdvt in support of his motion to withdraw Memo & Order dtd 4-29-77.	
-5-77	L Ostrer- Filed H.A. Silvergate's Certificate of service of deft's Notice of Motion & Affdvt. by mail to L.B.Pedowitz U.S Atty. on 5-3-77.	
-5-77	L. Ostrer- Filed Govt's AFFIDAVIT of Hans G. Seidemann- reaffirming previously submitted.	
-5-77	L. Ostrer- Filed Govt's SUPPLEMENTAL AFFIDAVIT of Peter Paul Calarco	
-5-77	L. Ostrer- Filed Govt's AFFIDAVIT of John C. Fine	
-5-77	L. Ostrer- Filed MENO-ENDORSED on deft's motion filed 5-5-77 - Motion denied. So ordered BRIEANT, J. m/n	
-6-77	L. Ostrer- Filed Motion to amend motion to vacate sentence.	
-6-77	L. Os er - Filed NOTICE OF MOTION of the deft. for an order that the certain documents be produced and made available to the coursel.	
-9-77	L. Ostrer- Filed AFFIDAVIT of Harvey A. Silverglate in support of Ostrer's motion filed 5-5-77.	
9-77	L. Ostrer - Filed Deft's MOTION for production of certain witnesses or, in the alternative, for the issuance of subpoenas. no ret. date.	
9-77	L. Ostrer - Fld. MEMORANDUM & ORDER - motion for a new trial will be reargued on 5-11-77. The stay is denied. BRIEANT, J. m/n.	
9-77	L. Ostrer - Fld. MEMORANDUM & ORDER - ordering certian transcripts unsealed, BRIEANT, J. m/n	
-16-77	L. Ostrer - Fld. Deft's MOTION for order that the gov't seek access to certain Swiss Bank records pursuant to the treaty between the United States of America and the Swiss confederation on Mutual Assistance in criminal Matters. No ret; date.	
-9-77	L. Ostrer - Filed MEMORANDUN & ORDER - with the exception of Nos, 6,10,11 and 12 and those documents which are already in Ostrer's possession, the Govt will provide the remaining documents to Ostrer's counsel as soon as possible. So ordered BRIEANT,J. m/n	
-31-77	L. Ostrer- Filed transcript of proceeding dated 3-11-77.	
-10-77	L. Ostrer- Trial begun & cont'd.	
-11-77	L. Ostrer- Trial cont'd	
-12-77	L. Ostrer- " "	
-13-77	L. Ostrer- " " Decision reserved.	
-3-77	L. Ostrer- Filed AFFIDAVIT of Jay Goldberg on behalf of the deft.	
-15-77	L. Ostrer- Filed AFFIDAVIT of Maurice Edelbaum on behald of the deft.	
-20-77	L. Ostrer, - Filed Petitioner's motion for leave to file and make a part of record certain agreed to transcriptions.	
-20-77	L. Ostrer, - Filed affdvt. of Harvey A. Silverglate.	
-20-77	L. Oster,- Filed Petitioner's motion for leave to file and make a part of the record certain transcriptions not agreed upon the parties.	
-20-77	L. Ostrer, - Filed memorandum of fact and law of the petitioner in support of his motion to vacate sentence.	

(Cont'd on page 2)

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DATE	PROCEEDINGS	Date Judg
6-30-77	Louis Ostrer - Filed Govt's Memorandum in Opposition to the deft's motion to vacate his sentence.	
7-18-77	Loius Ostrer- Filed Petitioner's Reply to Govt's Memorandum in opposition to the deft's motion to vacate sentence.	
-9-77	Filed transcript of record of proceedings, dated 5-12-77	
8-5-77	Louis Ostrer - Filed NOTICE OF DEFAULT rendering the guarantors jointly and severally liable for the full amount unpaid which is now in the sum of $10,000.	
-12-77	Louis Ostrer - Filed MEMORANDUM AND ORDER (Motion to reconsider) - The Court declines to alter or amend its April 29th ORDER in any fashion. Ostrer's petition for relief pursuant to 28 U.S.C. Sec 2255 is denied in all respects. BRIENAT, J. m/n	
-22-77	LOUIS OSTRER- Filed Deft's NOTICE OF APPEAL to the USCA from the Order and "Findings and Conclusions" dated 8-12-77 denying the Petitioner's mption to vacate his conviction and sentence pursuant to 28 U,S,C. S 2255. Mailed Notices: U.S.Atty and Appellant's Counsel.	

27

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

INDICTMENT

- v - :

71 Cr. 558

ANTHONY SOLDANO, JOHN DIOGUARDI, :
GARY FREDERICKS, MICHAEL HELLERMAN,
MICHAEL CARICATO, FRED GOODMAN, :
RICHARD GREENBERG, LOUIS OSTRER,
and MORRIS WINTER, :

Defendants. :

:
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The Grand Jury charges:

1. From on or about the 1st day of October, 1969 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, ANTHONY SOLDANO, JOHN DIOGUARDI, GARY FREDERICKS, MICHAEL HELLERMAN, MICHAEL CARICATO, FRED GOODMAN, RICHARD GREENBERG, LOUIS OSTRER and MORRIS WINTER, the defendants herein, and Anthony Di Lorenzo, George A. Drykerman, Steven Schoengold, John M. Kelsey, Murray Levine, Edward N. Palermo, Matthew Russo, Bruce Halpern, Harvey Bertram Pollak, William Kilroy, and Walter Tepper, named herein as co-conspirators but not as defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with other persons to the Grand Jury known and unknown to commit certain offenses against the United States, to wit, violations of Sections 77q(a), 77x, 78j(b), 78ff of Title 15, United States Code and Sections 1341 and 1343 of Title 18, United States Code.

2. It was part of said conspiracy that the defendants and co-conspirators unlawfully, wilfully and knowingly in the offer and sale of securities, to wit, common stock of Belmont Franchising Corporation (hereinafter Belmont) by the use of means and instruments of [illegible]portation and communications in interstate commerce and by the use of the mails, would directly and indirectly (a) employ devices, schemes and artifices to defraud; (b) obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engage in transactions, practices and courses of business which operated and would operate as a fraud and deceit upon the purchasers of the common stock of Belmont and upon any and all persons to whom the said defendants and co-conspirators, directly and indirectly, would attempt to sell the aforementioned securities.

3. It was further a part of said conspiracy that the defendants and co-conspirators, having devised and having intended to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, unlawfully, wilfully and knowingly, and for the purpose of executing said scheme and artifice and attempting so to do, would place and cause to be placed in post offices and authorized depositories for mail matter, and would cause to be delivered by mail according to the direction thereon, certain matter to be sent and delivered by the Post Office Department.

4. It was further a part of said conspiracy that the defendants and co-conspirators, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, unlawfully, wilfully and knowingly, would transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, writings, signs, signals, and sounds for the purpose of executing said scheme and artifice.

5. It was further a part of said conspiracy that the defendants and their co-conspirators in connection with the purchase and sale of securities, to wit, common stock of Belmont, would directly and indirectly, use means and instrumentalities of interstate commerce and the mails to use and employ manipulative and deceptive devices and contrivances in contravention of Rule 10b-5 [17 CFR Section 240.10b-5] of the rules and regulations of the United States Securities and Exchange Commission.

6. Among the means by which the defendants and co-conspirators would and did carry out the said conspiracy were the following:

(a) Defendants ANTHONY SOLDANO and FRED GOODMAN would and did agree to purchase all of the outstanding shares of Belmont (approximately 28,000 shares) at approximately $5 per share.

(b) Defendants ANTHONY SOLDANO and FRED GOODMAN would and did agree to establish and maintain an artificial price for Belmont stock and manipulate the price of said stock from approximately five dollars per share to fifteen dollars per share.

(c) Defendants ANTHONY SOLDANO and FRED GOODMAN would and did cause various brokerage firms to enter the "pink sheets" of the National Daily Quotation Service to establish and maintain an artificial price for and to convey the false and misleading impression that there was an active market in Belmont stock for the purpose of inducing the purchase of Belmont stock by others.

(d) Defendant RICHARD GREENBERG would and did agree to assist defendants ANTHONY SOLDANO and FRED GOODMAN; and would and did cause Lincoln Securities to enter the "pink sheets" of the National Daily Quotation Service to establish and maintain an artificial price for and to convey the false and misleading impression that there was an active market in Belmont stock for the purpose of inducing the purchase of Belmont stock by others.

(e) Defendants ANTHONY SOLDANO, MICHAEL HELLERMAN and FRED GOODMAN would and did agree that HELLERMAN would purchase all of the Belmont stock from SOLDANO and GOODMAN at approximately fifteen dollars per share and that SOLDANO and GOODMAN would sell Belmont through the over-the-counter securities market.

(f) Defendants ANTHONY SOLDANO and MICHAEL HELLERMAN would and did cause various members of the public to purchase and order substantial quantities of Belmont stock to establish and maintain an artificial price for and to convey the false and misleading impression that there was an active market in Belmont stock.

(g) Defendants JOHN DIOGUARDI and MICHAEL HELLERMAN would and did agree to split profits derived as a result of the sales by defendant MICHAEL HELLERMAN of Belmont stock at the artifically and manipulatively maintained price.

(h) Defendants MICHAEL HELLERMAN and LOUIS OSTRER would and did agree that OSTRER and his associates would purchase substantial quantities of Belmont to establish and maintain an artificial price for and to convey the false and misleading impression that there was an active market in Belmont stock for the purpose of inducing the purchase of Belmont stock by others.

(i) Defendant MICHAEL HELLERMAN and co-conspirator Matthew Russo caused defendant GARY FREDERICKS, a trader at Barad-Shaff Securities Corp., to enter the "pink sheets" to establish and maintain an artificially high price for Belmont stock.

(j) Defendants GARY FREDERICKS and RICHARD GREENBERG would and did take directions from co-conspirator Matthew Russo and others as to when, where and at what price to buy and sell Belmont stock.

(k) Defendants ANTHONY SOLDANO, JOHN DIOGUARDI, GARY FREDERICKS, MICHAEL HELLERMAN, MICHAEL CARICATO, FRED GOODMAN, RICHARD GREENBERG, LOUIS OSTRER, and MORRIS WINTER would and did agree to create the false and misleading impression that there was an active market in Belmont stock for the purpose of causing the price of said stock to rise.

(l) Defendants MICHAEL HELLERMAN and MORRIS WINTER would and did arrange to open up accounts at R. J. Orol & Co., Inc. and Russell & Saxe, brokerage firms, in nominee names and purchase and sell stock to create the false and misleading impression that there was an active market in Belmont stock for the purpose of causing the price of said stock to rise and be maintained at artifically high prices.

(m) Defendants ANTHONY SOLDANO, JOHN DIOGUARDI, GARY FREDERICKS, MICHAEL HELLERMAN, MICHAEL CARICATO, FRED GOODMAN, RICHARD GREENBERG, LOUIS OSTRER and MORRIS WINTER would and did cause the price of Belmont to rise to the artifically high level of $42 per share.

(n) Defendant JOHN DIOGUARDI, would and did call and hold meetings to resolve disputes between the defendants and co-conspirators and to decide upon the distribution of the proceeds.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the defendants did commit the following overt acts in the Southern District of New York:

1. In or about January or February, 1970 defendant LOUIS OSTRER was at 39 Debrosees Street, New York, New York.

2. In or about February, 1970 defendant FRED GOODMAN was at 103 Park Avenue, New York, New York.

3. In or about February, 1970 defendant ANTHONY SOLDANO was at 103 Park Avenue, New York, New York.

4. In or about March, 1970 defendant FRED GOODMAN was at 103 Park Avenue, New York, New York.

5. In or about March, 1970 defendant ANTHONY SOLDANO was at 103 Park Avenue, New York, New York.

6. On or about May 1, 1970 defendant MORRIS WINIER made a telephone call to Linden, New Jersey.

7. On or about May 8, 1970 defendant MICHAEL HELLERMAN was at 266 West 47th Street, New York, New York.

8. On or about May 8, 1970 defendant GARY FREDERICKS was at 266 West 47th Street, New York, New York.

9. On or about May 18, 1970 defendant MICHAEL HELLERMAN was at 31 East 28th Street, New York, New York.

10. On or about May 18, 1970 defendant RICHARD GREENBERG was at 31 East 28th Street, New York, New York.

11. On or about May 18, 1970 defendant MICHAEL CARICATO was at 31 East 28th Street, New York, New York.

12. In or about May, 1970 defendant JOHN DIOGUARDI was at 260 Fifth Avenue, New York, New York.

(Title 18, United States Code, Section 371)

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COUNTS ONE THROUGH TEN (17a)

The Grand Jury further charges:

1. From on or about the first day of October, 1969, up to and including the date of the filing of this indictment, in the Southern District of New York, the defendants ANTHONY SOLDANO, JOHN DIOGUARDI, GARY FREDERICKS, MICHAEL HELLERMAN, MICHAEL CARICATO, FRED GOODWIN, RICHARD GREENBERG, LOUIS OSTRER and MORRIS WINTER unlawfully, wilfully and knowingly in the offer and sale of securities, to wit, common stock of Belmont Franchising Corporation, by the use of means and instruments of transportation and communications in interstate commerce and by use of the mails (a) did employ devices, schemes and artifices to defraud; (b) did obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading; and (c) did engage in transactions, practices and courses of business which would operate and did operate as a fraud and deceit upon purchasers of said securities and other persons whom the said defendants, directly and indirectly, attempted to induce to purchase said securities.

2. The allegations contained in paragraph Six of Count One of this indictment are repeated and re-alleged as though fully set forth herein as constituting and describing some of the means by which the defendants committed the offense charged in Paragraph One of these counts.

3. On or about the dates hereinafter set forth in Counts Two through Ten, in the Southern District of New York, the defendants, ANTHONY SOLDANO, JOHN DIOGUARDI, GARY

[illegible], [illegible], [illegible], [illegible], [illegible] and [illegible], unlawfully, wilfully and knowingly did cause to be delivered by mail, according to the direction thereon, to the persons hereinafter set forth, the matter hereinafter set forth:

COUNT	DATE	ADDRESSEE	MATTER
2	1-23-70	George [illegible] 173 Riverside Dr. New York, N. Y.	A confirmation for sale of 2000 shares of Belmont stock.
3	2-27-70	Dr. Kaya Adlas 693 West End Avenue New York, New York	A confirmation for sale of 2000 shares of Belmont stock.
4	3-4-70	Asher Wilcher 5120 Earnscliffe Montreal, Quebec, Canada.	Confirmations for sale of 12,500 shares of Belmont stock.
5	3-5-70	Vito Soleno 6405 20th Avenue Brooklyn, New York	A confirmation for sale of 200 shares of Belmont stock.
6	3-5-70	L. & T. Fromm 865 First Avenue New York, New York	A confirmation for sale of 300 shares of Belmont stock.
7	3-26-70	Dina Celman c/o International Fashions 377 Fifth Avenue New York, New York	A confirmation for sale of 1600 shares of Belmont stock.
8	4-10-70	Joel Goldfarb 42 Willowbrook Lane Freeport, New York	A confirmation for sale of 200 shares of Belmont stock.
9	4-16-70	Mark Kleinman c/o Morris Winter 217 Broadway New York, New York	A confirmation for sale of 500 shares of Belmont stock.
10	5-4-70	Walter Bodenstein 260 Fifth Avenue New York, New York	A confirmation for sale of 300 shares of Belmont stock.

(Title 15, United States Code, Section 77q(a) and 77x, and Title 18, United States Code, Section 2)

Best Copy Available

COUNTS ELEVEN THROUGH TWENTY-THREE

1. From on or about the first day of October, 1969 up to and including the date of the filing of this indictment, in the Southern District of New York, the defendants, ANTHONY SOLDANO, JOHN DIOGUARDI, GARY FREDERICKS, MICHAEL HELLERMAN, MICHAEL CARICATO, FRED GOODMAN, RICHARD GREENBERG, LOUIS OSTRER and MORRIS WINTER, unlawfully, wilfully and knowingly did, directly and indirectly, by use of means and instrumentalities of interstate commerce and the mails, use and employ in connection with the purchase and sale of securities, to wit, common stock of Belmont, manipulative and deceptive devices and contrivances in contravention of Rule 10b-5 (17 CFR Section 240.10b-5) of the rules and regulations of the United States Securities and Exchange Commission.

2. The allegations contained in Paragraph Six of Count One of this indictment are repeated and realleged as though fully set forth herein, as constituting and describing some of the means by which said defendants committed the offense charged in Paragraph One of these counts.

3. On or about the dates hereinafter set forth in Counts Eleven through Twenty-Three, in the Southern District of New York, the defendants, ANTHONY SOLDANO, JOHN DIOGUARDI, GARY FREDERICKS, MICHAEL HELLERMAN, MICHAEL CARICATO, FRED GOODMAN, RICHARD GREENBERG, LOUIS OSTRER and MORRIS WINTER, unlawfully, wilfully and knowingly did use and cause to be used means and instrumentalities of interstate commerce and the mails pursuant to and in furtherance of the scheme alleged in Paragraph One of these counts, by sending and causing to

be sent to the persons and addresses hereinafter set forth,

the matter hereinafter set forth:

COUNT	DATE	ADDRESSEE	MATTER
11	2/27/70	Lillian Wilshinsky 861 Central Parkway Schnectady, N.Y.	A confirmation for purchase of 2500 shares of Belmont stock.
12	3/4/70	L & T Fromm 865 1st Ave. New York, NY	A confirmation for purchase of 300 shares of Belmont stock.
13	3/6/70	Fred Goodman 230 E. 15th St New York, NY	A confirmation for purchase of 700 shares of Belmont stock.
14	3/9/70	Steven Drourr 74 Salem Road Rockville Centre, NY	A confirmation for purchase of 400 shares of Belmont stock.
15	3/9/70	Taff Foods, Inc 99 Park Ave New York, N.Y.	A confirmation for purchase of 1000 shares of Belmont stock.
16	3/10/70	Louis Ostrer 377 Fifth Ave New York, NY	A confirmation for purchase of 2000 shares of Belmont stock.
17	3/11/70	Louis Ostrer 181 Kings Point Road Kings Point, NY	A confirmation for purchase of 3500 shares of Belmont stock.
18	3/13/70	Mark Kleinman c/o Morris Winter, Esq. 217 Broadway New York, NY	Confirmations for purchase of 500 shares of Belmont stock.
19	3/31/70	Joel Goldfarb 42 Willowbrook Lane Freeport, N.Y.	A confirmation for purchase of 1000 shares of Belmont stock.
20	4/22/70	N. Scott Elieson 30 North Broadway White Plains, NY	A confirmation for purchase of 1000 shares of Belmont stock.

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[illegible]-1947

COUNT	DATE	ADDRESSEE	MATTER
21	4/23/70	H. Scott Elieson 30 North Broadway White Plains, NY	A confirmation for purchase of 1000 shares of Belmont stock.
22	4/27/70	Murray Passman 313 W. 37th St. New York, N.Y	A confirmation for purchase of 500 shares of Belmont stock.
23	5/11/70	Julius Rosenblum c/o Aileen Inc. 331 East 38th St New York, N.Y.	Confirmations for purchase of 500 shares of Belmont stock.

(Title 15, United States Code, Sections 78j(b) and 78ff; Title 18, United States Code, Section 2)

[illegible]
70-1947

COUNTS TWENTY FOUR THROUGH FORTY

The Grand Jury further charges:

1. From on or about the dates hereinafter set forth in Counts Twenty Four through Forty, in the Southern District of New York, the defendants, ANTHONY SOLDANO, JOHN DIOGUARDI, GARY FREDERICKS, MICHAEL HELLERMAN, MICHAEL CARICATO, FRED GOODMAN, RICHARD GREENBERG, LOUIS OSTRER, and MORRIS WINTER, unlawfully, wilfully and knowingly did devise and intend to devise a scheme and artifice to defraud brokerage houses, purchasers of the common stock of Belmont and others to obtain money and property from said persons by means of false and fraudulent pretenses, representations and promises, and for the purpose of executing said scheme and artifice to defraud and attempting so to do, did place and cause to be placed in post offices and authorized depositories for mail matter, and did cause to be delivered by mail according to the directions thereon certain matter to be sent and delivered by the Post Office Department.

2. The allegations contained in Paragraph Six of Count One of this indictment are repeated and realleged as though fully set forth herein as constituting and describing some of the means by which the defendants committed the offense charged in paragraph 1 of Counts Twenty Four through Forty.

3. On or about the dates hereinafter set forth in Counts Twenty Four through Forty, in the Southern District of New York, the defendants, ANTHONY SOLDANO, JOHN DIOGUARDI,

ndl:sc
70-1947

GARY FREDERICKS, MICHAEL HELLERMAN, MICHAEL CARICATO, FRED GOODMAN, RICHARD GREENBERG, LOUIS OSTRER, and MORRIS WINTER, unlawfully, wilfully and knowingly did cause to be delivered by mail, according to the direction thereon, to the persons hereinafter set forth, the matter hereinafter set forth:

COUNT	DATE	ADDRESSEE	MATTER
24	1/22/70	EMA Associates 15 Martins Lane Lawrence, N.Y.	A confirmation for purchase of 1000 shares of Belmont stock.
25	1/23/70	George Drykerman 173 Riverside Drive New York, N.Y.	A confirmation for sale of 2000 shares of Belmont stock.
26	3/4/70	Vito Soleno 6405 20th Ave. Brooklyn, N.Y.	A confirmation for purchase of 200 shares of Belmont stock.
27	3/5/70	Vito Soleno 6405 20th Ave. Brooklyn, N.Y.	A confirmation for sale of 200 shares of Belmont stock.
28	3/6/70	Fred Goodman 230 E. 15 St. New York, N.Y.	A confirmation for purchase of 700 shares of Belmont stock.
29	3/9/70	Steven Drourr 74 Salem Road Rockville Centre,NY	A confirmation for purchase of 400 shares of Belmont stock.
30	3/9/70	Vito Soleno 6405 20th Ave. Brooklyn, N.Y.	Confirmations for sale of 2500 shares of Belmont stock.
31	3/10/70	Louis Ostrer 377 5th Ave. New York, N.Y.	A confirmation for purchase of 2000 shares of Belmont stock.
32	3/11/70	Fred Goodman 230 E. 15 St. New York, N.Y.	A confirmation for sale of 700 shares of Belmont stock.
33	3/11/70	Louis Ostrer 181 Kings Point Rd. Kings Point, N.Y.	A confirmation for purchase of 3500 shares of Belmont stock.
34	3/31/70	Joel Goldfarb 42 Willowbrook Lane Freeport, N.Y.	A confirmation for purchase of 1000 shares of Belmont stock.
35	4/22/70	William Kilroy 377 5th Ave. New York, N.Y.	A confirmation for sale of 1000 shares of Belmont stock.

COUNT	DATE	ADDRESSEE	MATTER
36	4/23/70	William Kilroy 377 5th.Ave New York, NY	A confirmation for sale of 1000 shares of Belmont stock.
37	4/27/70	Taff Foods Inc. c/o Fred Nathan 99 Park Ave. New York, NY	A confirmation for sale of 100 shares of Belmont stock.
38	5/1/70	Louis Rosenberg c/o Wantagh Kosher Caterers 1172 Wantagh Ave Wantagh, NY	Confirmations for purchase of 1000 shares of Belmont stock.
39	5/1/70	Martin Roth, Esq. 118-18 Queens Blvd Forest Hills, NY	A confirmation for sale of 1000 shares of Belmont stock.
40	5/4/70	Louis Rosenberg c/o Wantagh Kosher Caterers 1172 Wantagh Ave. Wantagh, NY	Confirmations for purchase of 1000 shares of Belmont stock.

(Title 18, United States Code, Sections 1341 and 2)

Foreman

WHITNEY NORTH SEYMOUR, Jr.
United States Attorney

Edelstein

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U. S. DISTRICT COURT
FILED
AUG 10 1971
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

- against - :

JOHN DIOGUARDI, :

Defendant. :

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NOTICE OF MOTION

71 CR 558

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of EDWARD S. PANZER, the attorney for the defendant, JOHN DIOGUARDI, and upon all the proceedings heretofore had herein, the defendant will move this Court, at a Trial Term thereof, to which the above case has been assigned, before the Hon. DAVID N. EDELSTEIN, United States District Court Judge for the Southern District of New York, at Foley Square, New YORK, New York on October 4, 1971 at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard, for an order seeking the following relief:

1. The defendant seeks an Order to Dismiss the within indictment pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure.

2. The defendant seeks, pursuant to Rule 21 of the Federal Rules of Criminal Procedure, an order transferring the trial of the within cause from the Southern District of New York to a District within the United States to be designated by the accused, JOHN DIOGUARDI, on the ground that there exists within this District such prejudice that the accused cannot here obtain a fair or impartial trial.

(18)

3. Defendant seeks severally, pursuant to Rules 8 and 14 of the Federal Rules of Criminal Procedure, a severance and separate trial from that of each co-defendant named in the indictment.

4. The defendant seeks, pursuant to Rule 16 of the Federal Rules of Criminal Procedure:

(a) An order requiring the Government to produce for ~~their~~ his inspection, copying and recording, any and all purported confessions, admissions or statements allegedly made by ~~them~~ him jointly and separately, to officers or agents of the Government, or persons acting in their behalf and at their behest, whether such are reduced to writing or not, or recorded by any means or not, so long as the same are within the possession, control or custody of the Government.

(b) Statements made by any of the co-defendants herein dealing with the subject matter of the indictment, made to any official agency employee, formal or otherwise, of the Government.

(c) Statements in any way obtained or recorded of the defendants herein, regardless of whether such statements are designated a confession or an admission.

(d) Names and addresses of material witnesses known to the Government and known by the Government to have knowledge concerning the subject matter of the within indictment, whether the Government does or does not intend to call said witnesses to testify in the trial of this case.

(e) Statements made by the above witnesses.

(f) All books, papers or documents seized, taken or obtained by the Government from the defendant or belonging to the defendant which are subject matter of the within indictment.

(g) All photographs, motion pictures, or still pictures of the defendant in any manner or form which are connected with this case or used in any manner by any witness in this case.

(h) Results and reports of scientific tests or experiments made by the Government in connection with this action, including, but not limited to, fingerprint analysis and chemical analysis, if any, with respect to the subject matter of the within indictment.

(i) The results and reports of physical or mental examinations, and all scientific tests and experiments made in connection with this particular case.

(j) The recorded testimony of ALL WITNESSES AND any of the co-conspirators and defendants that testified before the Grand Jury in this case.

(k) All evidence within the control or custody of the Government which is favorable and material either to the guilt, or to the punishment, of the defendant in this case.

(l) All other evidence relevant to the guilt or innocence of the defendant in the possession of the Government, or known to the Government, which the Government does or does not intend to introduce in the trial of this action.

(m) All records concerning any criminal activity and criminal convictions of the witnesses that will testify for the Government.

(n) All records concerning any criminal activities or criminal convictions of the defendant.

II. The defendant moves, as a predicate for appropriate motions under Rule 41 of the Federal Rules of Criminal Procedure for an order requiring the Government to disclose the following:

(a) For an order directing the United States Attorney for the Southern District of New York to disclose whether or not, in connection with this case, there has been electronic eavesdropping or wiretapping directed either against the telephone or premises used or occupied by the defendant or directed against the telephone or premises used or occupied by others in which the defendant's voice was overheard or his name identified or activities discussed, and if

Sworn to before me, this day of 19

such tapping and/or eavesdropping has occurred, to furnish the defendants each and every application for an order or return of an order connected with the interception of conversations over telephones listed to or controlled by the defendant and telephones over which the defendant's voice is claimed or alleged to have been heard or any other conversations which became the subject of eavesdropping by any other means in which conversations the defendant participated or was referred to directly or indirectly.

(b) Any and all objects, documents, or other kind of matter which the Government will claim it has seized from the defendant's person, possession, actual or constructive, or premises.

III. The defendant moves, pursuant to Rule 7 (f) of the Federal Rules of Criminal Procedure for an order requiring the Government to serve and file a Bill of Particulars setting forth the following:

AS TO THE FIRST COUNT:

(a) The names of all co-conspirators presently known to the Government and their addresses at the time of their alleged participation in the alleged conspiracy, and their addresses at the present time.

(b) Whether or not any of the defendants or other persons it will be claimed were present at the meetings described in the overt acts set forth in the indictment herein were acting on behalf of the Government at the time of the alleged meetings and acts and, if so, the names of such person or persons.

(c) Any additional overt acts not presently mentioned or set forth in the indictment herein, concerning which acts the Government presently intends to present and offer testimony upon the trial of the indictment herein.

(d) In detail, with whom each of the defendants and others known to the Government, but not named in the indictment herein are alleged to have conspired.

(e) Set forth as to Overt Acts 1 through 12 the time, with specificity, when it will be alleged that said overt acts occurred.

(f) State with specificity what devices, schemes, and artifices to defraud were used by the accused or any of the co-conspirators with respect to the within indictment.

(g) State with specificity what untrue statements of material facts were allegedly stated by the accused or any of the co-conspirators in the within indictment.

(h) State with specificity with respect to time, date, and place of the transactions and practices that were allegedly used by the accused or any of the co-conspirators with respect to the stock of Belmont in defrauding witnesses for the Government.

(i) State with specificity, giving the type, time, date, and locale of interstate communications that were used in the alleged scheme to defraud.

(j) State what act or acts allegedly committed by the accused were violations of Rule 10 b-5 (17 C.F.R. Section 240.10b-5) of the United States Security and Exchange Commission.

(k) With respect to Paragraph 6, subdivision g of the indictment, what was the exact manner in which the accused and one Michael Hellerman allegedly agreed to split profits derived as a result of sales of the Belmont stock.

(l) With respect to Paragraph 6, subdivision k, state, the place, date, locale and manner in which the accused and the co-conspirators mentioned in k did agree to create the false and misleading impression that there was an active market in the Belmont stock for the purpose of causing said stock to rise.

(m) With respect to paragraph 6, subdivision m, state with respect to time, date, locale and manner of operations as to how the accused and other co-conspirators mentioned in "l" caused the stock of Belmont to rise to the level of $42.00 per share.

(n) With respect to Overt Act No. 12, state the exact time and purpose with respect to criminal nature of said overt act.

sworn to before me, this day of 19

AND, for such other and further relief as to the Court may seem just and proper in the premises.

Dated: New York, New York
July 28, 1971

Yours, etc.

EDWARD G PANZER,

Attorney for Defendant
Office and P.O. Address:
299 Broadway
New York, New York 10007
Telephone: 349-5554

TO: HON. DAVID N. EDELSTEIN
Att: Law Clerk
United States Courthouse
Room 2104
Foley Square
New York, New York

WHITNEY NORTH SEYMOUR, JR.
United States Attorney
United States Courthouse
Foley Square
New York, New York
Att: Asst. U.S. Attorney Charles P. Updike

Edelstein, J.

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U.S. DISTRICT COURT
FILED
AUG 27 1971
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA :

- against - :

FRED GOODMAN, :

Defendant. :

- -x

NOTICE OF MOTION

71 CR 558

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of DAVID BLACKSTONE, attorney for the defendant, FRED GOODMAN, and upon all the proceedings heretofore had herein, the defendant will move this court, at a Trial Term thereof, to which this case has been assigned before the Hon. DAVID N. EDELSTEIN, United States District Court Judge for the Southern District of New York, at Foley Square, New York, New York on October 4, 1971, at 2:00 o'clock in the afternoon, or as soon thereafter as counsel can be heard, for an order seeking the following relief:

I. The defendant moves, pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, for an order requiring the government to serve and file a Bill of Particulars setting forth the Following:

A. With respect to Paragraph 6, subdivision (a) of the first count of the indictment, state when and where one Anthony Soldano and Fred Goodman agreed to purchase all of the outstanding shares of Belmont at approximately $5 per share.

B. With respect to Paragraph 6, subdivision (b) of the first count of the indictment, state the manner and method in which it is alleged that Anthony Soldano and Fred Goodman agreed to establish an artificial price for Belmont stock and manipulate the price of said stock from approximately $5 per share to $15 per share and when and where it is alleged such agreement was made.

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[illegible] herein, by delivering a true copy [illegible]

C. With respect to Paragraph 6, subdivisions (c) and (d) of the first count of the indictment, state when, where, and through what brokerage firm(s) and broker(s) the defendant Fred Goodman caused various brokerage firms to enter the "pink sheets" of the National Daily Quotation Service to establish and maintain an artificial price for and to convey the false and misleading impression that there was an active market in Belmont stock.

D. With respect to Paragraph 6, subdivision (e) of the first count of the indictment, state the place, date, locale, and manner in which the defendants Anthony Soldano, Michael Hellerman, and Fred Goodman agreed that Hellerman would purchase all of the Belmont stock from Soldano and Goodman at approximately $15 per share and that Soldano and Goodman would sell Belmont through the over-the-counter securities market.

E. Set forth as to overt acts 1 through 12 the time, with specificity, when it will be alleged that said overt acts occurred.

F. State with specificity what untrue statements of material facts were allegedly stated by the accused or any of the co-conspirators in the within indictment.

G. State with specificity, giving the type, time, date, and locale of interstate communications that were used in the alleged scheme to defraud.

H. State what act or acts allegedly committed by the accused were violations of Rule 10 b-5 (17 C.F.R. Section 240.10b-5) of the United States Security and Exchange Commission.

I. The names of all co-conspirators presently known to the government and their addresses at the time of their alleged participation in the alleged conspiracy, and their addresses at the present time.

J. Whether or not any of the defendants or other persons it will be claimed were present at the meetings described in the overt acts set forth in the indictment herein were acting on behalf of the government at the time of the alleged meetings and acts and, if so, the names of such person or persons.

the [illegible] herein, by delivering a true copy [illegible]
[illegible]
Sworn to before me, this day of 19

K. Any additional overt acts not presently mentioned or set forth in the indictment herein, concerning which acts the government presently intends to present and offer testimony upon the trial of the indictment herein.

L. In detail, with whom each of the defendants and others known to the government, but not named in the indictment herein are alleged to have conspired.

II. The defendant moves, as a predicate for appropriate motions under Rule 41 of the Federal Rules of Criminal Procedure, for an order requiring the government to disclose the following:

A. For an order directing the United States Attorney for the Southern District of New York to disclose whether or not, in connection with this case, there has been electronic eavesdropping or wiretapping directed either against the telephone or premises used or occupied by the defendant or directed against the telephone or premises used or occupied by others in which the defendant's voice was overheard or his name identified or activities discussed, and if such tapping and/or eavesdropping has occurred, to furnish the defendants each and every application for an order or return of an order connected with the interception of conversations over telephones listed to or controlled by the defendant and telephones over which the defendant's voice is claimed or alleged to have been heard or any other conversations which became the subject of eavesdropping by any other means in which conversations the defendant participated or was referred to directly or indirectly.

B. Any and all objects, documents, or other kind of matter which the government will claim it has seized from the defendant's person, possession, actual or constructive, or premises.

III. The defendant seeks, pursuant to Rule 16(e) and (b) of the Federal Rules of Criminal Procedure, the following:

A. An order requiring the government to produce for his inspection, copying and recording, any and all purported confessions, admissions or statements allegedly made by him jointly and separately, to officers or agents of the government, or persons acting in their behalf and at their behest, whether such are reduced to writing or not,

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upon

the herein, by delivering a true copy thereof to

person so served to be the person mentioned and described in said papers as the

Sworn to before me, this day of 19

or recorded by any means or not, so long as the same are within the possession, control or custody of the government.

B. Statements made by any of the co-defendants herein dealing with the subject matter of the indictment, made to any official agency employee, formal or otherwise, of the government.

C. All books, papers or documents seized, taken or obtained by the government from the defendant or belonging to the defendant which are subject matter of the within indictment.

D. All books, papers or documents seized, taken or obtained by the government from brokerage houses which reflect trading in Belmont stock on behalf of Fred Goodman.

E. All other evidence relevant to the innocence of the defendant in the possession of the government, or known to the government, which the government does or does not intend to introduce in the trial of this action.

F. All records concerning any criminal activity and criminal convictions of the witnesses that will testify for the government.

Yours, etc.

Dated: August 26, 1971

DAVID BLACKSTONE
Attorney for Defendant
401 Broadway
New York, New York 10013
Tel. No. 226-6684

To: Hon. WHITNEY NORTH SEYMOUR, JR.
United States Attorney
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

[illegible] herein, by delivering a true copy thereof to [illegible]
person so served to be the person mentioned and described in said papers as the
Sworn to before me, this day of 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA	:	
- against -	:	AFFIDAVIT
		71 CR 558
FRED GOODMAN,	:	
Defendant.	:	

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DAVID BLACKSTONE, being duly sworn, deposes and says:

1. I am the attorney for FRED GOODMAN, the defendant above named, and respectfully submit this affidavit in support of the instant motion for (a) a bill of particulars and (b) discovery and inspection.

2. The trial of the instant case shall be protracted and complicated. With respect to the defendant's motion for a bill of particulars, the defendant for the most part merely seeks to have the government set forth when and where it is alleged that defendant entered into unlawful agreements. With respect to discovery and inspection, the documents requested are clearly material to the defense and reasonable in scope.

Particular reference is made to the request for production of statements made by co-defendants and alleged co-conspirators to any government representative. Since the government has chosen to allege a single all-encompassing conspiracy, in which the government may utilize statements of co-defendants and co-conspirators as part of its case against defendant Goodman as if such statements were made by the defendant himself, the court should prevent surprise during trial by directing such production before trial.

the [illegible] herein, by delivering a true copy thereof to [illegible] personally. Deponent knew the person so served to be the person mentioned and described in said papers as the [illegible] therein.
Sworn to before me, this day of 19

Wherefore, it is respectfully requested that the court grant the relief sought herein.

DAVID BLACKSTONE

Sworn to before me this
27 day of August, 1971.

Betty C Sawyer

Notary Public - New York County
31-2274875
Term Expires 03/30/73

upon [illegible]
the [illegible] herein, by delivering a true copy thereof to h[illegible] personally. Deponent knew the person so served to be the person mentioned and described in said papers as the [illegible] therein.
Sworn to before me, this day of 19

Edelstein J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA :

-v- :

ANTHONY SOLDANO, JOHN DIOGUARDI, : 71 Cr. 558
GARY FREDERICKS, MICHAEL HELLERMAN,
MICHAEL CARICATO, FRED GOODMAN, :
RICHARD GREENBERG, LOUIS OSTRER,
and MORRIS WINTER. :

Defendants :

- - - - - - - - - - - - - - - - - - - x

U.S. DISTRICT COURT
FILED
OCT 20 1971
S.D. OF N.Y.

SIRS:

PLEASE TAKE NOTICE that upon the indictment and all of the papers and proceedings heretofore had herein, the defendant Richard Greenberg, will move before the Honorable David Edelstein, United States District Judge, United States Court House, Foley Square, New York, on November 1, 1971 at 10:00 A.M. thereof in Room 618 for an order pursuant to the Federal Rules of Criminal Procedure (Rules 7F & 16), directing the United States Attorney to serve and file within such reasonable time as the Court may direct a Bill of Particulars as herein requested, and also that he produce for inspection and copying by the defendant Richard Greenberg, the books, documents and tangible objects in the possession, custody or under the control of the United States of America and any and all other matters listed herein and made part of this application;

I

PRODUCE THE FOLLOWING DOCUMENTS FOR INSPECTION, COPYING OR PHOTOGRAPHING BY THE DEFENDANT RICHARD GREENBERG.

A. Any and all confirmations and statements of accounts relating to Counts Two through Forty.

B. Any and all purported confessions, admissions or statements made by the defendant Richard Greenberg; whether such confession, statement or admissions are recorded stenographically, or reduced to writing by the person taking or over hearing same.

C. Any and all purported statements, admissions or confessions made by any of the defendants or co-conspirators named in the indictment.

D. The recorded testimony of all defendants and conspirators named in the indictment or otherwise known to the government who appeared before the Grand Jury which found the indictment herein.

E. Copies of all books, papers, documents or tangible objects relating to this Indictment.

F. Copies of all transactions, tapes and recordings which may have been made in the course of the investigation of this matter by the United States Government, no matter what form said investigation took place.

G. Specifically the testimony of the defendant Richard Greenberg given during the course of any investigation herein, wherein he may have been called as a witness; also any statement or statements made by the defendant Richard Greenberg, at any time.

H. Copies of all documents of any and all transactions in which the defendant Richard Greenberg is alleged to be involved.

I. All physical evidence or documents which the United States Government may have seized from the defendant Richard Greenberg.

Julius Blumberg, Inc., Law Blank Publishers, 80 Exchange Place, at Broadway, N.Y.

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AS TO COUNT I

A. State what devices, schemes and artifices the defendant Richard Greenberg engaged in.

B. What untrue statements of material facts and omissions of material facts were or were not made by the defendant Richard Greenberg.

C. What were the practices and courses of business by the defendant Richard Greenberg, which operated as a fraud upon the prospective purchases.

D. What writings, sounds and signals were used as alleged in paragraph Four of the 1st Count of the Indictment.

E. Defendant Richard Greenberg demands copies of "pink sheets" of the National Daily quotation service." (Paragraph 6-1st Ct.)

F. What were the directions that the defendant Richard Greenberg took from co-conspirator Matthew Russo and others as alleged in "J" of the 1st count of the indictment.

G. Under subdivision (K) of paragraph 6 of the 1st count of the Indictment, state in what manner the defendant Richard Greenberg agreed to create false and misleading information that there was an active market.

H. In what manner did the defendant Richard Greenberg cause the price of Belmont to rise to the artificial level of $42.00 per share.

I. As to overt Act No. 10- did the defendant Richard Greenberg engage in any conversation; if so with whom, and set forth the substance of said conversation.

And for such other and further relief as this Court may find just and proper.

Dated: New York, New York
October 14, 1971

Yours, etc.
ABRAHAM SOLOMON
Attorney for Defendant
Richard Greenberg
85 Baxter Street
New York, New York 10013
431-6542

TO: HON. WHITNEY N. SEYMOUR
United States Attorney
Southern District of New York
Foley Square
New York, New York

OCKET AND SEND TO Edelstein ~~Ostrer~~

JUDGE ~~[illegible]~~

Knapp

3004

58

71-1572

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------x

UNITED STATES OF AMERICA :

-v- : **BILL OF PARTICULARS**

LOUIS OSTRER, et al., : 71 Cr. 558

Defendants. :

---------------------------------x

U.S. DISTRICT COURT
FILED
DEC 8 1972
S.D. OF N.Y.
27

SIRS:

The United States of America for its bill of particulars, states as follows (paragraph numbers correspond to paragraphs in defendant's motion papers):

1. The Government intends to prove the following meetings between the defendant Ostrer and other defendants and co-conspirators:

(a) In or about February 1970 with John M. Kelsey and Michael Hellerman.

(b) In or about early March 1970 with Bruce Halpern.

(c) In or about March 1970 with Anthony DiLorenzo, Michael Hellerman, and John Dioguardi.

(d) In or about mid to late March 1970 with John M. Kelsey and Michael Hellerman.

(e) On an unspecified date between February and May 1970 with Steven Schoengold, Anthony Soldano, and Michael Hellerman.

2. The Government's trial memorandum is being supplied under separate cover.

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Sworn to before me this

3. The defendant Ostrer is alleged to have defrauded, directly or indirectly, Aubrey Moss, Lee Evins, Neuberger, Loeb & Co. and its customers, and members of the investing public.

4. The defendant Ostrer obtained $30,440 from Aubrey Moss and $30,440 from Lee Evins.

Dated: New York, New York
December 6, 1972

Yours, etc.,

WHITNEY NORTH SEYMOUR, Jr.
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America

By: S. Andrew Schaffer
S. ANDREW SCHAFFER
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007

TO: MAURICE EDELBAUM, ESQ.
230 Park Avenue
New York, New York 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------X

UNITED STATES OF AMERICA

- v -

ANTHONY SOLDANO, JOHN DIOGUARDI,
GARY FREDERICKS, MICHAEL HELLERMAN,
MICHAEL CARICATO, FRED GOODMAN,
RICHARD GREENBERG, LOUIS OSTRER,
and MORRIS WINTER,

Defendants.

-----------------------------------X

71 Cr. 558

MOTIONS FOR BILL OF
PARTICULARS AND FOR
DISCOVERY AND INSPECTION

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavit of MAURICE EDELBAUM, sworn to on the 31st day of August, 1971, and upon the indictment herein and upon all the facts of proceeding heretofore had in this matter, the defendant LOUIS OSTRER will move the Honorable David Edelstein, United States District Judge, United States Courthouse, Foley Square, New York, New York, at a time to be determined by the Court, for orders pursuant to Rules 7(f) and 16 of the Federal Rules of Criminal Procedure directing the United States Attorney to serve and file within ten days of the date of such order a Bill of Particulars of said indictment with respect to the items listed in Part I below and directing the United States Attorney to produce for the inspection and copying by the defendant Louis Ostrer, the books, papers, documents and tangible objects in the possession, custody or control of the United States of America listed in Part II below:

by delivering a true copy thereof to [illegible] personally. Deponent knew the
and described in said papers as the [illegible] therein.
19

I.

Set forth the following particulars:

A. As to the first Count of the indictment:

1. State the names and addresses of all co-conspirators now known to the Grand Jury or the Government but not named in the indictment. As to those co-conspirators who are not now known but who may become known to the Government, file a Bill of Particulars within twenty days prior to the date set for trial.

2. On what date or dates and at what time and place is it alleged that the defendant Ostrer entered and became part of the conspiracy alluded to in the first Count of the indictment?

a. In what manner did the defendant Ostrer allegedly enter and become a member of the conspiracy?

b. Is it alleged by the Government that the entry of the defendant Ostrer into the conspiracy was as a result of a meeting or meetings with other persons?

i) If it is so alleged, with whom and when did the defendant Ostrer have such a meeting?

3. As to subparagraph h of Count One:

a. At what time on what date and in what place did the alleged agreement between the defendant Ostrer and Hellerman take place?

b. Did this alleged agreement come as a result of one or several meetings between defendants Ostrer and Hellerman?

by delivering a true copy thereof to personally. Deponent knew the
ad described in said papers as the therein.

19

c. At what time and place did the alleged meetings occur?

d. State the names and addresses of all persons present at such meetings.

e. State the content and substance of any conversations between defendant Ostrer and another at which the alleged agreement was made, with particular reference as to what the defendant Ostrer is alleged to have said or done at that time.

f. State the names and addresses of those associates of defendant Ostrer who, it is alleged, would purchase substantial quantities of Belmont.

g. Was this alleged agreement reached between defendants Ostrer and Hellerman directly or through an agent or agents acting for one or both of the parties?

i) If through an agent or agents, state the names and addresses of those parties and the name of the principal for whom they are are alleged to have been acting.

4. As to subparagraph k of the first Count, state;

a. When and where did this alleged agreement take place.

b. Did the alleged agreement come about at a meeting or meetings, and if so, give the date, time and location of each meeting.

and described in said papers as the therein.

c. State the names and addresses of each person alleged to have been present at each meeting.

d. State the content and substance of the conversation at which the alleged agreement was made with particular reference as to what the defendant Ostrer is alleged to have said or done at that time.

e. Is the defendant Ostrer alleged to have entered into the agreement alluded to in subparagraph k by himself or through an agent, and if through an agent, state the name and address of such person.

5. As to subparagraph m of Count One, state:

a. When and where did this alleged agreement take place?

b. Did the alleged agreement come about at a meeting or meetings, and if so, give the date, time and location of each meeting.

c. State the names and addresses of each person alleged to have been present at each meeting.

d. State the content and substance of the conversation at which the alleged agreement was made with particular reference as to what the defendant Ostrer is alleged to have said or done at that time.

e. Is the defendant Ostrer alleged to have entered into the agreement alluded to in subparagraph k by himself or through an agent, and if through an agent, state the name and address of such person.

and described in said papers as the therein.

19

f. On what date did the price of Belmont reach the level of $42 per share?

g. What was the price of Belmont per share on the date on which defendant Ostrer is alleged to have entered the conspiracy?

h. Give a list on a day-by-day basis of the value per share of Belmont from the start of the conspiracy through the date of this indictment.

i) State the manner in which defendant Ostrer caused the price of Belmont to rise to $42 per share.

6. As to the Overt Acts which are part of the first Count of the indictment:

a. As to the first Overt Act:

i) Where at 39 Debrosees Street is the defendant Ostrer alleged to have gone?

ii) Is the defendant Ostrer alleged to have met with anyone at 39 Debrosees Street?

iii) With whom - giving names and addresses - is defendant Ostrer alleged to have met at 39 Debrosees Street?

iv) On what specific date and at what time is he alleged to have gone to 39 Debrosees Street?

v) Where in the premises at 39 Debrosees Street is defendant Ostrer alleged to have gone?

vi) If a conversation is alleged to have taken place between defendant Ostrer and another at

39 Debrosees Street, give the substance of the conversation, with particular reference as to what the defendant Ostrer is alleged to have siad or done at that time.

7. As to the acts and agreements alluded to and alleged in subparagraphs c through n and Overt Acts 2 through 12, is it alleged and will evidence be adduced to show that the defendant Ostrer was present or participated in any of those acts or meetings?

a. If defendant Ostrer is alleged to have participated in any of those acts, in what manner did he participate?

8. Enumerate all other Overt Acts, specifying time, place and individuals involved, not mentioned in the indictment, concerning which acts the Government intends to offer evidence against the defendant Ostrer upon the trial of the indictment herein.

B. As to Counts Two through Ten:

1. Other than what is stated in Paragraph 6 of Count One, what means were used by defendant Ostrer and in what manner did the defendant Ostrer commit the offense or offenses stated in Paragraph 1 of Counts Two through Ten?

2. Does the Government allege the defendant Ostrer to have committed the acts in Counts Two through Ten directly as a principal or as an accomplice?

by delivering a true copy thereof to personally. Deponent knew the
and described in said papers as the therein.

a. As to which Counts in Two through Ten is defendant Ostrer alleged to be a principal and as to which is he alleged to have been an accomplice?

3. What device, scheme and artifice did the defendant Ostrer employ to defraud as alleged in Paragraph 1 of Counts Two through Ten?

4. Who is alleged to have been defrauded by the defendant Ostrer?

5. What money and property did the defendant Ostrer obtain by means of untrue statements and omissions to state material facts?

6. From whom did the defendant Ostrer obtain money and property by means of such statements and omissions?

7. What untrue statements of material facts were made by defendant Ostrer and what material facts did the defendant Ostrer omit to state?

8. To whom did the defendant Ostrer make untrue statements and omit to make statements, giving the names and addresses of each.

9. In what transactions, practices and courses of business is the defendant Ostrer alleged to have engaged in operating a fraud and deceit upon purchasers of the securities?

10. Upon what purchasers of said securities was such a fraud and deceit operated?

11. As to Paragraph 2 of Counts Two through Ten of the indictment, by what other means did the defendant Ostrer

by delivering a true copy thereof to personally. knew the
and described in said papers as the therein.
19

commit the offense charged in Paragraph 1 of Counts Two through Ten?

12. As to Paragraph 3 of Counts Two through Ten of the indictment, to which person listed in Counts Two through Ten did the defendant Ostrer cause to be delivered the confirmations alluded to in those Counts?

a. Is it alleged that each of the addressees listed in Counts Two through Ten was known to the defendant Ostrer?

b. Provide a list of each addressee mentioned in Counts Two through Ten who it was alleged was known to the defendant Ostrer.

13. State whether the defendant Ostrer is alleged to have caused the delivery of each and every confirmation listed in Counts Two through Ten or whether he is alleged to have caused only some or a few of the confirmations to be sent; provide a list of each confirmation that defendant Ostrer is alleged to have caused, either directly or indirectly, to be sent to the addressees.

14. State the manner by which defendant Ostrer caused any and all of the confirmations alluded to in Counts Two through Ten to be delivered to each of the addressees named therein.

15. State the name and address of each brokerage house through which each of the purchases listed in Counts Two through Ten were handled or consummated, giving the respective

by delivering a true copy thereof to personally. Deponent knew the
and described in said papers as the therein.
19

number and name of each account involved and the purchase price on each transaction of stock.

C. As to Counts Eleven through Twenty-Three:

1. Describe in detail the manipulative and deceptive device and contrivance used by the defendant Ostrer in violation of Rule 10b-5 as alleged in Paragraph 1 in Counts Eleven through Twenty-Three.

2. Other than what is stated in Paragraph 6 of Count One, what other means were used by the defendant Ostrer in committing the alleged offense charged in Paragraph 1 of Counts Eleven through Twenty-Three?

3. As to Counts Eleven through Twenty-Three, which addressees are alleged to have been sent confirmations for purchase as a result of the direct act of Louis Ostrer?

4. If it is alleged that the defendant Ostrer knew any of the addressees listed in Counts Eleven through Twenty-Three, which addressees is he alleged to have known?

5. Is the defendant Ostrer alleged to have been a principal or an accomplice in the commission of the acts stated in Counts Eleven through Twenty-Three. Detail those Counts in which he is alleged to have been an accomplice and those in which he is alleged to have been a principal.

6. As to which addressees stated in Counts Eleven through Twenty-Three, is the defendant Ostrer alleged to have caused to be sent the confirmations alluded to in Counts Eleven

by delivering a true copy thereof to ... personally. Deponent knew the
and described in said papers as the
therein.

through Twenty-Three?

7. State the name and address of the brokerage house through which each of the purchases listed in Counts Eleven through Twenty-Three was transacted and/or consummated, stating the name and number of each respective account and stating the purchase price of each respective purchase.

D. As to Counts Twenty-Four through Forty:

1. State the manner in which the defendant Ostrer devised a scheme or artifice to defraud brokerage houses, purchasers of common stock of Belmont and others.

2. State the false and fraudulent pretenses, representations and promises which were made in the alleged scheme alluded to in Paragraph 1 of Counts Twenty-Four through Forty.

3. List the names and addresses of those brokerage houses and persons upon whom this scheme and artifice was practiced and to whom false and fraudulent representations were made.

4. Provide a list of the date or dates on which the defendant Ostrer placed or caused to be placed mail pursuant to the scheme alleged in Paragraph 1 of Counts Twenty-Four through Forty, providing the name and address of the addressee in each such instance.

5. State the other manner and means by which the defendant Ostrer committed the offense charged in Paragraph 1

of Counts Twenty-Four through Forty other than what is contained in Paragraph 6 of Count One of the indictment.

6. Provide a detailed list of those addressees referred to in Counts Twenty-Four through Forty to whom the defendant Ostrer directly delivered or caused to be delivered the confirmations for purchase alluded to in those Counts.

7. State in what Counts, in Counts Twenty-Four through Forty, the defendant Ostrer is alleged to have been a principal and in what Counts he is alleged to have been an accomplice.

8. State whether the defendant Ostrer is alleged to have known any of the addressees listed in Counts Twenty-Four through Forty, setting forth those persons that the defendant Ostrer is alleged to have known.

9. State the name and address of the brokerage house through which each of the purchases listed in Counts Twenty-Four through Forty was transacted or consummated, setting forth the name and number of each respective account and the purchase price of each respective purchase.

E. Set forth Paragraphs 4, 5 and 6 of the first Count of this indictment, which were alluded to throughout the indictment but which were not contained in the copy of the indictment received by counsel for the defendant Ostrer.

by delivering a true copy thereof to personally. Deponent knew the
and described in said papers as the therein.
19

II.

Produce the following documents for inspection, copying or photographing by the defendant Ostrer:

A. Any and all confirmations and statements of account relating to Counts Two through Forty that may now be in the possession of the Government.

B. Any and all purported confessions, admissions or statements made by the defendant Ostrer which are in the possession, custody or control of the Government, the existence of which is known or by the exercise of due diligence may become known to the United States Attorney -- whether such confessions, admissions or statements were recorded stenographically or reduced in any form of writing by the person taking or overhearing such statements or recorded by means of any mechanical or electrical device.

C. Any and all purported confessions, admissions or statements made by any of the defendants or co-conspirators named in the indictment herein which are within the possession, custody or control of the Government, the existence of which is known or be the exercise of due diligence may become known to the United States Attorney -- whether such confessions, admissions or statements were recorded stenographically or reduced in any form of writing by the person taking or overhearing such statements or recorded by means of any mechanical or electrical transcription.

D. The recorded testimony of all defendants and conspirators named in the indictment or otherwise known to the

and described in said papers as the therein.

Government had before the Grand Jury who found the indictment herein.

E. Copies of all books, papers, documents or tangible objects relating to this indictment which are in the possession, custody or control of the United States Attorney.

F. Copies of all transcriptions, tapes and recordings which may have been made in the course of the investigation of this matter by the United States Attorney or any other agency of the United States Government, whether in the form of wiretap, bug or other eavesdropping or listening device and whether made on the defendant's telephone, home, voice or otherwise.

AND FOR SUCH OTHER AND FURTHER RELIEF as the Court may find just and proper.

Yours, etc.

MAURICE EDELBAUM, Esq.
Attorney for the
Defendant Louis Ostrer
230 Park Avenue
New York, New York 10017
Tel: RE 2-1300

TO: Honorable Whitney N. Seymour
United States Attorney
Southern District of New York
Foley Square
New York, New York

and described in said papers as the therein.
19

MORVILLO   LASKER, J.
JUDGMENT AND ORDER OF PRO ION (Revised Dec. 66)   Cr. Form No. 1(

United States District Court
FOR THE
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT
FILE
NOV 6 19
S.D. OF N

UNITED STATES OF AMERICA
v.
MICHAEL HELLERMAN

No. 71 cr 553

On this 6th day of November, 1972, came the attorney for the government
the defendant appeared in person, and[1] Vincent Brodarick, of counsel

IT IS ADJUDGED that the defendant upon his plea of[2] Guilty to Count 15 and the Court that there is a factual basis for the plea

has been convicted of the offense of unlawfully, wilfully and knowingly, by use of inters commerce and the mails, use and employ in connection with the purchase and sale of securities to wit, Belmont Franchising on March 9, 1970 to Taff Foods, Inc. in vio of Title 15, US.C., Sections 78j (b) and 78ff; Title 18, US.C., Sections 2.

as charged[3] in Count 15
and the court having asked the defendant whether he has anything to say why judgment should be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

consecutive

IT IS ADJUDGED[4] that imposition of sentence be suspended and the defendant is pl probation for a period of FIVE (5) years ~~each~~ to be served ~~concurrently with~~
mg ~~but consecutively to~~ and not concurrently with the sentence imposed under 70 cr period of said probation to commence at the expiration of the custody served unc 967. The probation so imposed shall be subject to the standing probation order Court and to the special conditions that 1) the defendant shall not engage in th securities business or act as an advisor to any one other than the members of hi family 2) the defendant shall make available a fund of $12,500.00 to be used to restitution of his victims to the extent that they can be indentified and in acc with a plan of restitution to be approved by his Probation Officer. Open counts through 14 and sixteen through forty are dismissed on motion of defendant.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himse as a law-abiding, industrious citizen and observe such conditions of probation as the Court may pr scribe. Otherwise the defendant may be brought before the court for a violation of the court's order

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order the probation officer of this court, one of which shall be delivered to the defendant by the probati officer.

Morris E Lasker
United States District Judge.

JOHN LIVINGSTON
Clerk.

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[1] Insert "by [name of counsel], counsel" or "without counsel; the court advised the defendant of his right to counsel and asked h whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance counsel."

[2] Insert (1) "guilty, and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and verdict of guilty," (3) "n guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

[4] If sentence is imposed but execution suspended, and probation ordered, enter here (1) sentence or sentences, specifying counts if an (2) whether sentences are to run concurrently or consecutively, and if consecutively, when each term is to begin with reference to terminatio of preceding term or to any outstanding or unserved sentence, (3) whether defendant is to be further imprisoned until payment of fine fines and costs, or until he is otherwise discharged provided by law, (4) the facts regarding the suspension of the sentence or sentences an (5) the period of probation.

If sentence is suspended and probation ordered, enter here the following: "The imposition of sentence is hereby suspended and th defendant is placed on probation for a period of years from this date."

(9)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, : 72 CR [illegible]

vs. : NOTICE OF MOTION

JOHN DIOGUARDI, et al

Defendants.

On the annexed affidavit of JAY GOLDBERG, ESQ., defendant Dioguardi will move this Court pursuant to FRCrP 17.1 for a pretrial conference before the Honorable David N. Edelstein, Chief Judge of the U. S. District Court, at a time and place to be set by the Court for an order requiring the Government to furnish counsel with the following as to Michael Hellerman:

1. A list of all cases investigated or under investigation or about to be investigated by the Government relating solely to conduct of Michael Hellerman;

2. copies of any indictments where he is or was a co-conspirator, accomplice or participant;

3. all news releases issued by the Securities and Exchange Commission relating to stocks investigated or under investigation or about to be investigated in which Michael Hellerman was or is involved;

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person so served to be the person mentioned and described in said papers as the therein.
Sworn to before me, this day of 19

4. any other material in the possession of the Government bearing adversely on the credibility, character and reputation of Michael Hellerman; and

5. any other material relating to any matter which defense counsel could properly use in cross-examination to inquire into Hellerman's motive and bias in favor of the Government or expectation of favor from the Government.

Yours etc.,

Dated: N. Y., N. Y.
December 11, 1972

JAY GOLDBERG
Attorney for Defendant
John Dioguardi
299 Broadway
New York, N. Y. 10007
374-1040

TO:

HAROLD M[illegible], ESQ.
Ass't. U. S. Attorney
U. S. Courthouse
Foley Square
New York, N. Y. 10007

MAURICE EDELBAUM, ESQ.
Attorney for Defendant Ostrer
230 Park Avenue
New York, New York

person so served to be the person mentioned and described in said papers as the therein.
Sworn to before me, this day of 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs. : AFFIDAVIT

JOHN DIOGUARDI, et al

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JAY GOLDBERG, defendant's attorney, being duly sworn, deposes and says:

This motion is submitted as part of what I consider to be my continuing obligation to alert the Court to problems that will arise during trial. I am advised that the Government will call as one of its witnesses, Michael Hellerman. Mr. Hellerman's name figured prominently in the trials before Judge Pierce and Judge Lasker relating to the Imperial Investment Co. stock fraud. His name and misconduct figured prominently as well in a recently concluded trial in the case of U. S. vs. Irwin Lane, et al. Further, his name, I am advised, has appeared prominently in the case of U. S. vs. Roth, being tried before Judge Gagliardi. Finally, in the trial of the Belmont case before Judge Knapp there was much mention of the misconduct in general terms of Michael Hellerman.

Normally at the conclusion of the testimony of a Government witness the U. S. Attorney is required to furnish defense counsel with a list of those cases where the witness is under investigation by the Government, this for the purpose of permitting the defense to explore the issue of the witness's expectation for favor from the Government. During the trial before Judge Pierce this past summer relating to the Imperial matter, Government counsel did at the conclusion of the witness's testimony furnish a list of matters for which a particular witness was under investigation. However, based on my experience in the trial before Judge Pierce and after reading the transcript of the first Imperial trial before Judge Lasker, I noted that on several occasions Government counsel did not have a copy of an indictment that had been returned against a particular witness, or neglected through oversight to mention a particular investigation. In the trial before Judge Lasker I recall counsel had to during the luncheon recess go to the Record Room to try to get a copy of a particular indictment and on one occasion I believe Judge Lasker asked his law clerk to try to locate a particular indictment for use by defense counsel in the cross-examination of a witness.

I propose that with respect to any witness called by the prosecution in the Belmont case before Your Honor, particularly the witness Hellerman, whose misconduct has been so widespread as to make it virtually impossible for defense counsel on its own to locate all matters for which he is being investigated or

person so served to be the person mentioned and described in said papers as the therein.
Sworn to before me, this day of 19

in which he has been a participant, the Government should be required to prepare a folder for the use of the Court and defense counsel which should contain the material set out in paragraphs numbered 1 through 5 of the Notice of Motion.

The law is clear that as part of the Government's continuing obligation it must make available to the defense any information in its possession which the defense may use to impeach the credibility of akey witness: see in particular, Giles vs. Maryland, 386 U.S. 66 (1967); Williams vs. Dutton, 400 F.2d 797 at 800 (5th Cir. 1968).

There is no reasonable justification under the facts of this particular case ~~why~~ this material should not be disclosed by the prosecutor in advance of trial. See Williams vs. Dutton, supra; U. S. vs. Gleason, 265 F.S. 880 (SDNY 1967); U. S. vs. Leichtfuss, 331 F.S. 723 (ND Ill. 1971); U. S. vs. Ladd, 48 FRD 266 (D.Alas. 1969). See also U. S. vs. Bryant, 439 F.2d 642 (D.C. Cir. 1971).

The proposal which I have set forth by this motion would not only provide the defense with the material to which it is entitled, but it would also facilitate the progress of the trial. There is no justification for requiring defense counsel, after being furnished with a [illegible] of cases during the trial, to have to dispatch a secretary to the Record Room to locate an Indictment that may be pending in the District. So too, counsel should have the right to receive this information in advance of trial in order to enable him to develop the kind of leads about which Mr. Justice Fortas wrote in Giles, supra. No one at all familiar

person so served to be the person mentioned and described in said papers as the therein.

Swern to before me, this day of 19

[illegible] called [illegible]

[illegible] about which [illegible] in the

ensuing paragraphs of this affidavit can have no quarrel with

[illegible] claim that [illegible] is not [illegible] a key witness, but also that

defense counsel should have available to it all material

relating [illegible] the impeachment of this witness as well as reflecting

on his bias or expectation of reward from the side for whom he

is testifying.

JAY GOLDBERG

Sworn to before me this

11th day of Dec., 1972.

person so served to be the person mentioned and described in said papers as the [illegible] therein.

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF **CERTIFICATION BY ATTORNEY**

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

STATE OF NEW YORK, COUNTY OF **ATTORNEY'S AFFIRMATION**

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is

the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF ss.: **INDIVIDUAL VERIFICATION**

, being duly sworn, deposes and says that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.: **CORPORATE VERIFICATION**

, being duly sworn, deposes and says that deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.
This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF New York ss.: **AFFIDAVIT OF SERVICE BY MAIL**

Jay Goldberg
being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at
New York, N. Y.
That on the 11th day of Dec 1972 deponent served the within Notice of Motion
upon Harold McGuire, Ass't. U. S/ Atty & Maurice Edelbaum, Esq. attorney(s) for
Gov't & deft Ostrer in this action, at Foley Sq. & 230 Park Ave, NYC respectively
the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — XXXXXXXX — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this 11th day of December 1972

Frances B. Dolan

STATE OF NEW YORK, COUNTY OF 23 ss.: **AFFIDAVIT OF PERSONAL SERVICE**

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No.
deponent served the within
upon
the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me, this day of 19

OC
served March 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(DNE)

71 CR 358

NOTICE OF MOTION

---------------------------------x

UNITED STATES OF AMERICA,

vs.

JOHN DIOGUARDI, et ano

Defendants.

---------------------------------x

SIRS:

On the affidavit of JAY GOLDBERG, ESQ. and the annexed exhibits, the undersigned will move this Court at a time and place to be set by Honorable David N. Edelstein, Chief U. S. District Judge for a new trial pursuant to FRCrP 33 on the ground defendant Dioguardi was denied a trial by 12 qualified jurors, in that one juror was suffering from a mental infirmity making her incapable of rendering efficient jury service within the meaning of 28 USC 1861.

Dated: New York, N. Y.
March 1, 1973

Yours etc.,

S/

JAY GOLDBERG
Attorney for Defendant
John Dioguardi

S/

EDWARD PANZER,
Attorney for Defendant
John Dioguardi
209 Broadway
New York, N. Y. 10007

TO:

HAROLD F. McGUIRE,
Ass't. U. S. Attorney

&

MAURICE EDELBAUM, ESQ.
230 Park Avenue
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------x

UNITED STATES OF AMERICA,

vs. : SUPPORTING AFFIDAVIT

JOHN DIOGUARDI, et ano

Defendants.

-----------------------------------x

STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

JAY GOLDBERG, defendant Dioguardi's attorney, being duly sworn, deposes and says:

This Court is fully familiar with the facts of this long tedious trial involving the resolution of complex issues posed under the Securities laws and the criminal laws of the United States. A jury deliberated 3 days before reaching only a partial verdict. It now appears one juror was suffering from a psychosis making her incapable of rendering "efficient jury service". This fact was unknown to all until now but the fact remains defendant was not afforded a fair trial by a competent 12 man jury.

After defendant's return to Danbury he received an unsolicited letter from a named juror. Annexed hereto as Exhibit A is a true copy of that letter. (It is in Dioguardi's hand, he having copied it from the letter he received from the juror.) I have, however, excised her name to protect her from public disclosure in these filed papers, but in chambers or court will provide the name and address as appears in the original letter.

A reading of the letter reveals aspects of her personality that make it impossible for her to be competent. Annexed as Exhibit B is a copy of a letter from a Board certified psychiatrist leaving no doubt as to her incompetency when matched against the requirements of 28 USC 1861.

She is delusional: "I have eyes...that I can see things before they happen I can tell you about other and what they are thinking and doing. * * * Unfortunate a curse was put upon them (the eyes)"; she is having people working on freeing her from the curse; she tells of things appearing before her when she was a juror; she writes of the goodness of Dioguardi's wife and how she appeared, though Mrs. Dioguardi was never in Court; she writes of what she "can see" of Mrs. Dioguardi and her business though this never was raised in the trial.

Is this a juror who will not pre-judge, a juror who will restrict herself to the testimony as it was heard from the stand? A reading of the psychiatric report provides a ready and complete answer to her incompetency.

I should note that no one from the defense has spoken with this juror for we understand the impropriety of this and we trust the same is recognized by Government counsel.

The law on the subject is sparse though it is a verity that a "person who is incompetent to serve cannot serve;..."

U. S. vs. Golden, 235 F.S. 1020 (D.Mass. 1964). There is authority for a post verdict inquiry into competency. See U. S. vs. Ross, 203 F.S. 100 (E.D.Pa. 1962). Incompetency warrants a new trial People vs. Kurth, 34 Ill.2d 387, 216 N.E.2d 154. To hold otherwise would be to strip defendant of his right to a trial by 12. This in no way runs counter to the rule against impeachment of a jury vote. There is no intrustion sought into the deliberative process. The insanity or mental infirmity is a matter extrinsic to the deliberative process leaving defendant's fate improperly to only 11 competent jurors. There, of course, can be no issue of waiver for the incompetence was not and could not be known earlier.

This Court should on receipt of this motion direct a conference at which time the following ought to be done:

(1) a protective order should be made restricting counsel or their agents from approaching the juror;

(2) the name and address of the juror will be disclosed;

(3) Dioguardi will waive his privilege and testify to the circumstances of his receipt of the letter;

(4) a hearing ought to be held on the factual issue raised herein with necessary mental examination; and

(5) should the juror be found to have been unqualified within the meaning of 28 USC 1861 a new trial must be granted.

JAY GOLDBERG

Sworn to before me this
1st day of March, 1973.
/S/
[illegible]
NOTARY PUBLIC, State of New York
No. 03-[illegible]
Qualified in Bronx County
Commission Expires March 30, 19673

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------X

UNITED STATES OF AMERICA :

-vs- : Docket No. 71 Cr. 558

LOUIS OSTRER, : MOTION FOR A NEW TRIAL

Defendant. :

-----------------------------------X

SIRS:

PLEASE TAKE NOTICE that the defendant, LOUIS OSTRER, hereby joins in the motion for a new trial, a hearing in support thereof, and such other and further relief as to the Court may seem just and proper, based upon the incapacity of a trial juror, heretofore filed by the co-defendant, John Dioguardi, and presently pending before this Court. The motion papers of the co-defendant Dioguardi are hereby adopted by reference as though fully set forth herein.

Respectfully submitted,

New York, New York
March 12, 1973

MAURICE EDELBAUM
Attorney for Defendant
230 Park Avenue
New York, New York 10017
(212) RE 2-1300

TO: Whitney North Seymour, Jr.
United States Attorney for the
Southern District of New York

86

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------X

UNITED STATES OF AMERICA	:	Docket No. 71 Cr. 558
-vs.-	:	MOTIONS FOR: (1) JUDGMENT OF ACQUITTAL, OR, (2) ORDER SETTING ASIDE VERDICT AND GRANTING A NEW TRIAL
LOUIS OSTRER,	:	
Defendant.	:	

-----------------------------------X

SIRS:

PLEASE TAKE NOTICE that, upon all the proceedings heretofore had herein, and upon the Memorandum submitted herewith, the above-named defendant hereby moves the Court for:

1. A judgment of acquittal notwithstanding the verdict; or, in the alternative,

2. An Order setting aside the verdict and granting the defendant a new trial.

This motion is made pursuant to the Due Process Clause of the United States Constitution and pursuant to the following Rules of the Federal Rules of Criminal Procedure: 14 (Prejudicial Joinder); 23 (Trial by Jury or by the Court); 24 (Selection of Jurors); 26 (Admissibility of Evidence); 29 (Judgment of Acquittal); 30 (Erroneous Instructions to the Jury); 33 (New Trial); and 52 (Plain Error).

The grounds advanced in support of the above noted motions are:

1. The Government failed to establish the defendant's guilt beyond a reasonable doubt, based upon legal and credible evidence;

2. The defendant Ostrer should have been granted a separate trial from that of the co-defendant Dioguardi;

3. The Court deprived itself of, or wrongfully exercized, its discretion in denying the defendant Ostrer a non-jury trial;

4. The remarks of the prosecutor during the course of the trial, in the presense of the jury, were such as to deprive the defendant of a fair trial;

5.The defendant was improperly and unfairly limited in his attempts to attack the credibility of the prosecution witnesses;

6. The agreement which existed between the government and the witness Hellerman, prior to and during the trial herein, was such as to require the exclusion of Hellerman's testimony at a criminal trial in a court of the United States;

7. The defendant was deprived of a fair trial by virtue of the testimony of government witnesses who sought to explain their prior conduct by reference to fear;

8. The Court improperly excused juror No. 3 after the trial had commenced;

9. The Court improperly charged the jury as to the basis upon which the defendant could be convicted of the various crimes charged;

10. The defendant's right against self-incrimination, as well as the presumption of innocence, were breached by the comments of the prosecutor concerning the defendant's failure to call witnesses.

Yours, etc.,

New York, New York
March , 1973

MAURICE EDELBAUM
Attorney for Defendant
230 Park Avenue
New York, New York 10017
(212) RE 2-1300

TO: United States Attorney, Southern
District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Docket No. 71 Cr. 558

UNITED STATES OF AMERICA
-vs.-
LOUIS OSTRER,
Defendant.

MEMORANDUM IN SUPPORT OF POST-TRIAL MOTIONS

INTRODUCTION

After a jury trial, the defendant Ostrer, and his co-defendant, Dioguardi, were convicted upon various counts of an indictment which charged that they, together with eight other defendants and eleven additional, but unindicted, persons, conspired to and did engage in a scheme to fraudulently promote and sell the common stock of Belmont Franchising Corporation, by the use of instruments of transportation and communications in interstate commerce and by the use of the mails, in contravention of the rules and regulations of the Securities and Exchange Commission.

The defendant Ostrer was convicted upon Counts 1 (conspiracy), 9 (mailing of a stock sale confirmation in furtherance of a fraudulent scheme for the sale of stock), 16-19 (mailing of a confirmation with regard to the sale of Belmont stock as part of a manipulative or deceptive device in contravention of Rule 10B-5), 31, 33-36 (use of the mails with respect to the delivery of confirmations concerning the sale of Belmont stock, as part of a scheme to defraud). He was acquitted upon Counts 14, 15, 29, 32, 38 and 39 of the indictment.

The government's case against Ostrer was, admittedly, dependent upon the testimony of various alleged co-conspirators of sordid backgrounds who had received consideration from the government in exchange for their testimony.

POINT I.

THE GOVERNMENT FAILED TO ESTABLISH THE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT, BASED UPON LEGAL AND CREDIBLE EVIDENCE.

For all of the reasons advanced at trial, as well as those contained in this Memorandum, we respectfully submit that the defendant Ostrer was not established, by means of legal and credible evidence, to have been guilty beyond a reasonable doubt of the crimes charged.

POINT II.

THE DEFENDANT SHOULD HAVE BEEN GRANTED A SEPARATE, NON-JURY TRIAL FROM THAT OF THE CO-DEFENDANT, JOHN DIOGUARDI.

Prior to trial, the defendant Ostrer moved the Court for a non-jury trial and for a severance of his trial from that of the co-defendant, John Dioguardi. A Memorandum of Law was submitted in support of these motions. So as not to unduly burden the Court by a repetition of the allegations and arguments contained in those papers, they are incorporated by reference in this Memorandum.

The events at trial established, beyond doubt, the clearly prejudicial effects which the defendant sought to avoid by his motions for a severance and for a non-jury trial. The proceedings upon the selection of the jury herein confirmed the fact that a number of the jurors were acquainted with the name and reputation of the co-defendant Dioguardi (See Tr. 1702). Additionally, newspaper publicity down to the time of trial earmarked Dioguardi and an alleged co-conspirator in this case, Anthony DiLorenzo, as members of organized crime (Tr. 1061-1066). The instant trial also contained a number of references to the so-called, unrelated Imperial conspiracy, in which Dioguardi had been charged with criminal conduct (e.g., Tr. 394, 500).

While a separate trial would not have avoided the mention of Dioguardi's name, it would have made possible the granting of a non-jury trial and the avoidance of the necessarily prejudicial atmosphere which the presence of a reputed organized crime figure in the case generated. It is noteworthy that, during the course of the trial, the court noted to counsel for the defendant Ostrer:

> "From the beginning you have gone in one direction and Mr. Goldberg has gone in another, and it seems you have separate interests." (Tr. 151-152; see also Tr. 933-947)

In view of the developments at trial, we respectfully submit that the motion for a severance should have been granted and that the defendant Ostrer should have been permitted to go to trial without a jury. The failure to grant the requested relief, requires that the jury verdict be set aside and that a new, separate trial should be granted.

POINT III.

THE REMARKS OF THE PROSECUTOR DURING THE COURSE OF THE TRIAL, IN THE PRESENCE OF THE JURY, WERE SUCH AS TO DEPRIVE THE DEFENDANT OF A FAIR TRIAL.

The atmosphere at this trial was calculated to deprive the defendant of a fair and objective view of the evidence on the part of the jury. A variety of prejudicial themes continually recurred in the form of comments by the prosecutor and during the examination of prosecution witnesses. The keynote for this barrage of prejudice was sounded by the prosecutor at the beginning of his opening statement to the jury:

> "As a prosecutor, I suppose the question I have been asked most often is, 'why don't they do something about the guys behind the scenes?' I would like to have a nickel for every time I have been asked that question." (Tr. 6)

Although an objection to this remark was sustained by the Court, it nevertheless must have had the effect of enlisting the jurors in some kind of holy war against the "Mr. Bigs" of organized crime that had previously frustrated the best efforts of the United States Attorney's office.

A second phase of the improper effort to undermine the defense involved a disparagement of the efforts and motivations of defense counsel. Thus, in the presence of the jury, counsel for Dioguardi was accused of "just plain mud slinging" (Tr. 1472), and questioning of a prosecution witness concerning his relationship with the government were summarily declared to be "preposterous" accompanied by a thumping on the table (Tr. 1558, 1634).

During the course of defense counsel's summation, the prosecutor rose to declare " . . . that it is no part of Hellerman's deal with the government to commit perjury" (Tr. 1725).

In his own summation, the prosecutor did not hesitate to have the jury speculate, in a manner favorable to the prosecution, as to the contents of the written agreement which the government had entered into with Hellerman (Tr. 1798-1799). The prosecution then went on to reach the heights of coercion in advising the jury as follows:

> "But, ladies and gentlemen, if the defense lawyers come before you and say that even though you think these people were involved in this scheme criminally and up to their ears, if they come to

> you and say that even though you think that the government has been so terrible in making deals, which we have heard about until the rafters ring, that you ought to acquit these defendants in spite of the conviction that they are guilty and let them walk out of a scheme in which you are convinced of their guilt, then ladies and gentlemen, I suggest you tell that to the Judge."
> (Tr. 1799)

Although the Court, upon objection of defense counsel, told the jury to disregard the prosecutor's comment, that comment must be taken within the context of a notorious incident which occurred in the United States District Court of the Eastern District of New York during the course of this trial, and concerning which the jurors must have been aware. Indeed, that incident had been the subject of substantial discussion during this trial (Tr. 974, 1061-1071). The remarks of the prosecutor in summation were, in view of this background, all the more unpardonable.

Not content with the sufficiency of his own evidence to prove his case, the prosecutor sought to draw an inference of guilt from the failure of the defense to produce witnesses for the purpose of contradicting the prosecution's band of admitted criminals and perjurors. The prosecutor argued:

> "That is what the defense would have you believe, ladies and gentlemen, but the defense can't wash away the evidence and they can't wash away the fact that on no single fact of any significance whatsoever was Hellerman ever disputed, was he cross-examined, *were there witnesses brought into court to disprove it*." (Tr. 1811)

Upon objection by the defense, the Court instructed the jury that "the defense has no obligation to produce any witnesses" (Tr. 1811-1812), but the prosecutor merely continued to argue that, notwithstanding the absence of an *obligation* on the part of the defense:

> "However, the defense, just like the government, has the capability of calling witnesses, and there are witnesses who are available to the defense, as well as to the government. I think his Honor will instruct you that *you are entitled to draw an inference,* if you find it is appropriate to do so, or you may draw no inference at all." (Tr. 1815)

An objection by defense counsel was overuled, and the prosecutor continued:

> "Now, the fact that nobody disputed Hellerman's story, directly or on cross-examination or in any other way to the facts as opposed to proper cross-exam-

> ination directed to show that he was an evil fellow, you may find is a terribly significant factor." (Tr. 1815-1816)

A motion for a mistrial based upon these comments was denied by the Court (Tr. 1816).*

We respectfully submit that the nature of the prosecutor's remarks in the presence of the jury were such as to be violative of the standards of due process. Section 5.8 of the American Bar Association's Standards Relating to the Prosecution Function (approved draft, 1971), provides as follows:

> "Argument to the Jury.
>
> "(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecution intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
>
> "(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the de-

---

* Although we here include these comments of the prosecutor under our characterization of his improper remarks, we shall hereafter argue the fact that these comments and the rulings by the trial court, effectively deprived the defendants of their right to refrain from offering any evidence whatsoever.

> fendant.
>
> "(c) The prosecutor should not use arguments calculated to inflame the passions or prejudice of the jury.
>
> "(d) The prosecutor should refrain from arguments which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused, under the controlling law, or by making predictions of the consequences of the jury's verdict."

See also: Berger v. United States, 295 U.S. 78 (1935); Harris v. United States, 402 F. 2d 656 (D.C. Cir. 1968) [Per then Circuit Judge Burger]; Hall v. United States, 419 F. 2d 582 (5th Cir. 1969); Dunn v. United States, 307 F. 2d 883 (5th Cir. 1962); United States v. Isaza, 453 F. 2d 1259 (2nd Cir. 1972); United States v. Tomaiolo, 249 F. 2d 683, 694 (2nd Cir. 1957); United States v. Bucros, 304 F. 2d 177 (2nd Cir. 1962).

POINT IV.

THE DEFENDANT WAS IMPROPERLY AND UNFAIRLY LIMITED IN HIS ATTEMPTS TO ATTACK THE CREDIBILITY OF THE PROSECUTION WITNESSES.

As already noted, the prosecution's case depended overwhelmingly upon the testimony of prosecution witnesses who were admitted criminals and perjurors and who had motives of substantial self-interest in testifying for the government. We respectfully submit that the repeated instances upon which the defense was thwarted in exercising its full right to impeach the credibility of these witnesses, violated the defendant's rights to a fair trial and effectively deprived the defendant of his Sixth Amendment right to cross-examine the witnesses against him (See: Tr. 252, 277-278, 606, 867, 950, 1166-1167, 1233, 1243-1244, 1464-1473, 1525, 1549, 1576, 1695, 1718, 1724, 1726-1729, 1755, 1798, 1811, 1815, 1899-1900).

It has long been recognized that cross-examination as to the "trait of veracity" is always material to the trial of a criminal case. United States v. Provoo, 215 F. 2d 531, 537 (2nd Cir. 1954); Simon v. United States, 123 F. 2d 80, 85 (4th Cir. 1941); United States v. Kubacki, 237 F. Supp. 638 (E.D. Pa. 1965); Lyda v. United States, 321 F. 2d 788, 793 (9th Cir., 1963).

In United States v. Zborowski, 271 F. 2d 661 (2nd Cir., 1959), at p. 668, the United States Court of Appeals for the Second Circuit held:

> "The requirement that the government must prove its case beyond a reasonable doubt means at the very least, that the government itself should not, by any failure to disclose relevant evidence, prevent the defendant from producing evidence which might create the reasonable doubt. Out standards of fair play in federal criminal proceedings require that the government should present its evidence *in its true colors and that it should never be a party to withholding any evidence which materially bears on the credibility of a witness it places on the stand*." [Emphasis added]

It stands to reason that if the suppression of such evidence requires a new trial, *a fortiori*, a defendant should be permitted to cross-examine a witness with particularity as to such prior misconduct at his trial in the first instance. In its most recent opinions, the United States Court of Appeals for the Second Circuit has left no doubt as to this basic principle. *United States* v. *Lipton*, 467 F. 2d 1161, 1165-1166 (2nd Cir. 1972); *United States* v. *Vito*, 467 F. 2d 1401, 1403-1404 (2nd Cir., 1972); *United States* v. *Alberti*, - F. 2d - (2nd Cir., 1972), slip sheet opinions at pp. 1172-1173.

Given the various other factors present in the instant case, the following holding by the Supreme Court of the United States is particularly relevant:

> "The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of its testimony to be determined by a properly instructed jury." Hoffa v. United States, 385 U.S. 293, 311 (1966)

POINT V.

THE AGREEMENT WHICH TEXISTED BETWEEN THE GOVERNMENT AND THE WITNESS HELLERMAN, PRIOR TO AND DURING THE TRIAL HEREIN, WAS SUCH AS TO REQUIRE THE EXCLUSION OF HELLERMAN'S TESTIMONY AT A CRIMINAL TRIAL IN A COURT OF THE UNITED STATES.

During the course of this trial, the defense moved for a mistrial, or, in the alternative, that the testimony of the witness Hellerman should be stricken from the record due to the nature of the existing agreement between Hellerman and the government. In support of that motion, the defense filed a memorandum with the Court. Rather than repeat the allegations and arguments of that memorandum, as well as those which were made at trial, we resubmit those allegations and arguments as though fully set forth herein (See: Tr. 460, 631, 707, 824, 867, 944, 1718, 1724, 1755, 1798).

POINT VI.

THE DEFENDANT WAS DEPRIVED OF A FAIR TRIAL BY VIRTUE OF THE TESTIMONY OF GOVERNMENT WITNESSES WHO SOUGHT TO EXPLAIN THEIR PRIOR INCONSISTENT STATEMENTS BY REFERENCE TO FEAR.

On redirect examination of the prosecution witness Winter, the following occurred:

> "Q. And you responded on cross-examination that you never once in all that testimony did you mention the name Johnny or John Dioguardi, is that correct?
>
> "A. That is correct.
>
> "Q. Is there a reason why on all those occasions you never mentioned the name John Dioguardi? Is there a reason?
>
> "A. Yes.
>
> "Q. What is that reason?
>
> "A. I had some thought that it might endanger me if I did so." (Tr. 1303)

As it did throughout the trial, in threatening to raise the spectre of fear before the jury, the government relied upon the case of United States v. Cirillo, - F. 2d - (2nd Cir., 1972), slip sheet opinions, at p. 339, for the proposition that a prior inconsistent statement can be explained away by a witness by reference to his fear of the defendant at the time the prior inconsistent statement was made. This is, in fact, an unwarranted extension of the principle enunciated in Cirillo. In that case, the testifying witnesses derived their alleged fear from statements that had, in fact, been made to them to the effect that they would be killed if they informed on the defendants (slip sheet opinions at pp. 350-351). In the present case, it appears that Winter's "fear" merely resulted from the fact that he "had some thought". If a witness may, without any showing of some concrete threat of a direct or indirect nature, merely explain away an inconsistency with the claim that he "thought" he might be in danger, the potential for the introduction of prejudicial testimony in the trials of criminal cases will be overwhelming. We respectfully submit that, under the facts of this case, such testimony, and the persistent threat to elicit such testimony, in the absence of a reasonable demonstration that the witness possessed something more than a "thought", deprived the defendant of a fair trial. (See also the testimony of the government witness Schoengold at Tr. 1597-1601).

POINT VII.

THE COURT IMPROPERLY EXCUSED JUROR NO. 3 AFTER THE TRIAL HAD COMMENCED.

For the reasons set forth by defense counsel at pp. 560-578 of the trial record, we respectfully submit that the defendant's Constititional right to a jury trial, as well as his right under Rule 24(c) of the Federal Rules of Criminal Procedure, were violated by the course of conduct followed by the trial court which led to the discharge of a trial juror, although no showing had been made, at any stage that the juror was "unable or disqualified to perform [his] duties." (F.R.Crim. P., Rule 24-c).

POINT VIII

THE DEFENDANT'S RIGHT AGAINST SELF-INCRIMINATION, AS WELL AS THE PRESUMPTION OF INNOCENCE, WERE BREACHED BY THE COMMENTS OF THE PROSECUTOR CONCERNING THE DEFENDANT'S FAILURE TO CALL WITNESSES.

We have reproduced supra, at pp.8-9, the prosecutor's arguments to the jury concerning the defendant's failure to call witnesses, and his claim that such failure was a basis for the jury to draw an inference against the defense. It will be noted that the prosecutor's statements in this regard were: 1) not provoked by defense arguments, 2) not justified by some indication that the defense had such witnesses available to it, other than the defendants themselves, 3) and not earmarked to any particular issue in the case. In each instance, the record was preserved by an appropriate objection, and the Court permitted to stand the prosecutor's claim that the jury could properly draw an inference, adverse to the defense, from the failure of the defense to call witnesses.

In view of the above, we resepectfully submit that the defendant's rights were violated and that a new trial is required. Linden v United States, 296 F. 104 (3rd Cir., 1924); Barnes v United States, 8 F.2d 832 (8th Cir., 1925); Desmond v United States, 345 F.2d 225 (1st Cir., 1965) Rodriguez-Sandoval v United States, 409 F.2d 529 (1st Cir., 1969). See also: United States v Lipton, - F.2d - (2nd Cir., September 19, 1972) Slip sheet opinions at 4549, 4561-2, and authorities therein cited.

POINT IX

THE COURT IMPROPERLY CHARGED THE JURY AS TO THE BASIS UPON WHICH THE DEFENDANT COULD BE CONVICTED OF THE VARIOUS CRIMES CHARGED.

The defendant hereby reasserts all of the requests, objections and exceptions which were taken with respect to the Ccurt's charge at the trial herein, and submits that the failure to charge as requested by the defendant deprived him of a fair trial, and permitted the defendant to be convicted upon less than legally sufficient evidence.

CONCLUSION

For all of the above reasons, the verdict of the jury should be set aside and the indictment should be dismissed. In the alternative, a new trial should be granted.

Respectfully submitted,

MAURICE EDELBAUM,
Attorney for Defendant Louis Ostrer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA, :

-against- :

JOHN DIOGUARDI and : 71 Cr. 558
LOUIS OSTRER,
:
Defendants.
:
- - - - - - - - - - - - - - - - - - - -x

New York, New York
March 20, 1973
9:25 A. M.

Before:

HON. DAVID N. EDELSTEIN,

District Judge.

Appearances:

WHITNEY NORTH SEYMOUR, JR., ESQ.,
United States Attorney,
S. ANDREW SCHAFFER, ESQ. and
JOHN A. LOWE, ESQ.,
Assistant United States Attorneys.

JAY GOLDBERG, ESQ. and
EDWARD PANZER, ESQ.,
Attorneys for defendant John Dioguardi.

MAURICE EDELBAUM, ESQ.,
Attorney for defendant Louis Ostrer.

THE CLERK: U. S. versus Dioguardi. Both sides ready?

MR. GOLDBERG: Ready, your Honor.

MR. SCHAFFER: Government is ready, your Honor.

MR. GOLDBERG: At this time, if the Court please, I would like to be heard on my motion made on March 1, 1973, to set aside the verdict and for a new trial as the ultimate relief requested on the ground that the defendant Dioguardi was denied a trial by twelve competent jurors within the meaning of 28 U.S.C. 1861.

That law tels us -- should I be heard, your Honor?

THE COURT: Please, sure.

MR. GOLDBERG: That law tells us that a juror is not competent to serve if she suffers from a mental infirmity which renders her incapable of performing efficient jury service, and the key phrases, it seems to me, are "efficient jury service" and "mental infirmity."

As your Honor knows, the defendant Dioguardi was tried on an indictment of many, many counts. The trial was several weeks in length. It was by no means a simple assault case but rather one that dealt with the complicated securities laws, and your Honor's charge to the jury was not one that would be expected in a simple assault or the normal kind of criminal case. It was rather a lengthy charge with a number of concepts to be considered by the jury in deciding the case.

Now, wholly unsolicited, this defendant was the recipient of a letter which we believe was sent to him by a member of the jury. The defendant has taken the position in his moving papers that he is willing to waive his privilege with respect to his receipt of the letter, lest there be any claim that any attempt was made to cause this letter to be sent, because I represent from what I know that this letter was sent in a wholly unsolicited -- was sent wholly unsolicited.

Mr. McGuire in his opposing papers says that we have made no showing of prejudice. It's true that we have not conferred with the juror, feeling that without the Court's permission it would not be appropriate to do so, but I call the Court's attention to a quotation from United States against Silverman, decided by the Second Circuit in 449 F.2d 1341, where the Court said:

> "We would not hesitate to find prejudice where the claimed prejudice might have adversely affected the challenged juror's ability to decide a case intelligently."

I offer the statement of the six psychiatrists, all diplomates of the American Board of Psychiatry and

Neurology who are unanimous in their view that this patient is psychotic on the basis of the letter. That's all we have to go on. That letter indicates to a number of the psychiatrists that this juror was or did undergo a psychotic episode during her jury service.

There is the statement in the juror's letter that there are things that appeared before her while she was on the jury bench that she can't talk about. She talks about the ability to see things before they happen and about a curse being put upon her eyes and that her eyes are still closed from this curse or partly open. But, of course, she is hoping that Bertha and Olive will do something to remove the curse.

I suggest to your Honor impartial jury service consistent with your direction to the jury that they keep an open mind, that they not prejudge the matter before the evidence is in, that they decide the case not on the basis of what they think or speculate might be the facts but on the basis of what the evidence is as it appears from the witness stand and such documents as are received in evidence, if that is the test of efficient jury service then I submit I can only come to one conclusion from reading the juror's letter and the reports of the six doctors, that this psychotic juror couldn't have obeyed the directions which are an essential component to efficient jury service.

Now, it's true that the law has protected the right of privacy of the jurors, but the law has not so protected a juror from any attack relating to extrinsic forces that may have affected the juror's deliberations. The Court is not allowed impeachment of jury verdicts by going into the deliberative process but the Court has, to my knowledge, never enunciated a policy that would prevent, for example, inquiry as to whether a juror was bribed or a juror was approached improperly, things extrinsic to what went on in the jury room as they might affect the juror's efficiency as a member of the panel.

In this case, this is an extrinsic kind of force. This is her psychotic condition that makes her incapable of rendering efficient jury service, so the psychiatrists tell us. It seems to me that whatever rights she may have to privacy, it must be remembered that we didn't seek this letter out and that we are dealing with a defendant who, according to the medical report which I submitted to your Honor, has a very severe health condition, prolonged incarceration could have very disastrous effects upon him, and he has rights, too, and his right is one of the most fundamental protected by the Constitution, a right to a jury of twelve, twelve competent jurors, not eleven; and I submit that whatever rights the juror might otherwise have to privacy she in some sense has waived it by undertaking to write him a letter and if you have to weigh the competing interests, I say to your Honor that the right of a defendant who stands before you subject to prolonged incarceration is the paramount right and he should be accorded the right to have this juror examined so that this Court can make an intelligent judgment as to her competency.

I might point out that though I submitted six detailed letters from six diplomates, the United States Attorney has seen fit to submit that letter to no medical authority, has offered no counterproof, and I submit that if you deny this motion without a hearing this case will be considered by the Court of Appeals on the basis of the affidavits and supporting proof being taken as true, and it seems to me the factual issues ought to be resolved at a hearing with an examination, and that is further spelled out in my motion papers and that's my motion.

THE COURT: Mr. Edelbaum, you have joined in this motion, have you not?

MR. EDELBAUM: Yes. May I be heard, your Honor?

THE COURT: You may.

MR. EDELBAUM: Your Honor, the least we should be entitled to in connection with this motion is a hearing.

The government has said in its memorandum:

"The psychiatrists' letters do not purport to diagnose a disabling psychosis or even a neurotic condition in Miss Rush. All the psychiatrists have done is to state that while the record before them is insuffici for any real diagnosis, they suspect" -- it's underlin "the existence of some possible infirmity. This kind of speculation is not a sufficient basis on which to order a hearing."

However, the government is incorrect. The letter from Dr. John J. Vetter of 103 East 86th Street, who is a qualified psychiatrist under the laws of the State of New York, says in his conclusion:

"In my opinion there is a clearcut evidence of mental disorder in the writer of the letter to Mr. Dioguardi which is discussed and quoted above. The abnormal thinking processes, impairment of judgment, hallucinatory and delusional belief directly involving the case at hand would indicate an incapacity by reason of mental infirmity to render efficient service or to have functioned efficiently as a juror in the case concerned."

Then we have Dr. Samuel C. Karlan, a doctor in Flushing, New York. He is a diplomate of the American Board of Psychiatry and Neurology, a fellow of the American

Psychiatric Association. He is a qualified psychiatrist of the New York State Department of Hygiene. And he says:

"It is clear from this letter that this patient is having imagination about what she can see and what she can do and these are in the form of visual hallucinations and apparent auditory hallucinations. It is also clear from this letter that she had these visions while she was on the jury. It is therefore my opinion from the letter in evidence that this patient underwent a psychotic episode while she was on the jury and while she wrote this letter which is suggestive of a schizophrenic mechanism and that she was not in contact with reality."

Now Dr. Damino, who is also a qualified psychiatrist.

"I am a diplomate of the American Board of Psychiatry and Neurology certified in psychiatry. I am also the Medical Director of the Family Court Mental Health Clinic of Nassau County. I am a member of the New York bar since 1957. I was formerly an adjunct professor of psychology in Molloy College, Rockville Center, New York."

What does he conclude, your Honor?

"In view of this very obvious preoccupation of Genena Rush with the internal world of her delusions at the time when she served on the jury, any conclusions, decisions or the like of Genena Rush made at the time she served on the jury have no validity as to the evidence presented in court. Put it another way, at the time that she served in the jury, she was utterly incapable of thinking logically as to the evidence and utterly incapable of properly evaluating the evidence."

The government in its memorandum has said that we have shown no basis for concluding that at the time of the trial, at the time of the deliberations of the jury that this woman suffered from a mental infirmity which would disqualify her. That isn't so from what we have shown here.

Your Honor, her disqualification, her inability to act as a juror would be just as if one of the jurors became ill or died during deliberations. We are entitled to twelve judges of the facts. When she was incapable, without the consent of the defendant no verdict of eleven can stand in any court in our United States judicial system.

So I don't see any reason why we have to demonstrate prejudice. We are entitled to a hearing, Judge, and I think in the interest of justice your Honor should grant a hearing, and that's what we are here for. We have shown a prima facie case right on the evidence that would entitle us to go further. If your Honor grants a hearing, we can then discuss how that hearing should be conducted. We can then discuss, perhaps to protect this juror's rights in some way that she may have, your Honor may have to assign counsel. I don't know, your Honor, but I think the least that your Honor should do is grant a hearing in this very serious matter.

The only defense that the government could possibly have to avoid this hearing is if they could show that this letter was false, that this letter was not written by Miss or Mrs. Rush -- I don't know whether she is a Miss or Mrs. That would be the only possibility.

Yesterday your Honor asked the government whether they were going to raise as an issue the fact that the letter was really written by Miss Rush. So I believe there is no question of that in view of the government's answer yesterday.

I know it may be embarrassing to this poor lady, but, Judge, this is a very serious charge of which my client has been convicted. He stands here to be sentenced today if your Honor denies our motions out of hand, and I think in the interest of justice you should grant a hearing.

Thank you very much, your Honor.

MR. SCHAFFER: May I proceed, your Honor?

THE COURT: You may.

MR. SCHAFFER: May it please your Honor, it is the government's position that an evidentiary hearing into an alleged mental infirmity of a juror should be held only where there has been an exceptionally high probability that such a hearing would reveal (a) an infirmity amounting to actual prejudice or other fundamental incompetence, and (b) a strong probability that such infirmity infected the juror's deliberations.

The government submits that only in the most exceptional cases ought the Court look beyond the record of the voir dire examination of the proposed jurors during which it was found the juror in question has held a job and has apparently discharged it correctly and responsibly in a hospital for a year and has been employed by the same hospital for a period of four years, she was able to recall her prior job in 1944 in response to a question as to whether she had ever been in the government's employ, and that the Court should not look beyond the record of this voir dire examination and the apparent nature and conduct of the jury deliberations which in the present case were to every indication orderly and meticulous and gave every indication of rational thought.

A high threshhold showing before a hearing is granted is especially important in cases of alleged mental infirmity as opposed to other statutory disqualifications such as literacy and prior convictions. For example, your Honor, in the Silverman case quoted by Mr. Goldberg, the issue there was a juror's inability to read and write English in a tax evasion case where there were many exhibits introduced into evidence. This was discovered during the course of jury deliberations on the last day and brought to the attention of the Court by the foreman. The Court ruled that the juror was competent in that the exhibits submitted were mostly -- the relevant and probative exhibits were mostly in the form of numbers which she could understand and that those which required literacy in English were not germane to the outcome of the jury's deliberations.

But when the Court gave the language that Mr. Goldberg quoted about "we would reverse the conviction if it was shown that the defect might have affected the jury's deliberations," the context of that quotation was if it had been shown that the juror not only could not read and write English but could not understand English.

And the government would distinguish cases in which the statutory defect is literacy or a prior conviction which are easily ascertained.

The difference in the case of mental competency is that -- or the allegation of mental competency is that the very holding of the hearing to determine the existence of the defect is by its very nature a procedure frought with danger.

With the Court's permission, I would like to quote from the Third Circuit Court of Appeals in the case of U. S. ex rel Daverse v. Hohn, 198 F. 2nd 934, Third Circuit, 1952, cited in the government's memorandum in opposition to the holding of the hearing.

In that case the petitioner in a habeas corpus proceeding, after state remedies had been exhausted, alleged that one of the jurors (a) was prejudiced and (b) was mentally incompetent, suffering from a paranoid condition. A hearing was held by the United States District Court only into the question of prejudice and the Court refused to hold a hearing on the question of competency. And the Third Circuit approved that procedure with the following language:

"A fishing expedition into a juror's competency may not be employed as the basis to attack a conviction valid on its face. To rule otherwise would be to strike a serious blow at the sanctity of the jury system, for any juror who it was alleged might be suffering from paranoid tendencies could in effect be put on trial as to his mental competence. We cannot santion such a course. It would make it impossible to procure veniremen."

And further the Court went on to say in an additional paragraph:

"We wish to make plain that we join the court below in disapproving the general practice of interviewing a juror after a trial as to his state of mind.during a trial. There may conceivably be special circumstances which would justify such a course, but we do not find them here. A full exercise of the right of voir dire examination ordinarily will afford a defendant ample opportunity to ascertain the qualifications of a prospective juror and to determine whether he possesses bias and prejudice."

It should be noted that the danger in holding the hearing itself is met by the equally serious danger, which has long been recognized in our jurisprudence, of impeaching the verdict, which is a separate question after you reach the threshhold question of the existence of a defect and then inquire as to the cause and effect relationship between the defect and the outcome. So in this case we would have at least two very serious impairments in the traditional secrecy and privacy of jury proceedings.

Surely, your Honor, this Court should make no distinction between a letter which is apparently unsolicited, and for purposes of this argument we make no objection to authenticity while reserving our right to make such objection at a future date if the evidence warrants, surely the Court should make no distinction between an apparently unsolicited letter and one which might have been solicited.

We urge that no such distinction be made because the true origin of such letters in the future, should the Court decide to hold a hearing, may require yet another hearing to determine the true origin of the letter. What is unsolicited and what is solicited is a very tenuous distinction and very hard to trace as a matter of proof at a hearing into the jury's deliberations.

I would also ask the Court to consider two additional hypothetical examples closely related to the present case. In this instance we have an allegation the letter had come from the juror in question. Suppose, for example, the letter had come from her neighbors, Bertha and Olive, who related in exact words the conversation with the juror in question. Would we then allow a hearing to take place into the mental competency of the juror based on the declarations of her neighbors?

Or another hypothetical. Suppose the letter had come unsigned and we didn't know its origin. Would we then inquire into the competency of this juror?

Your Honor, the government submits that it is simply frightening to contemplate the challenges which would arise to jury verdicts should this practice be encouraged.

Mr. Goldberg has alluded to the fact that the juror in question has somehow waived her right to privacy by initiating the communication with the defendant in this instance. But the government submits, your Honor, that this single juror's right to privacy is not the sole issue before the Court. The question is the privacy of jury deliberations and the jury selection process and the finality of that process. And, as the Third Circuit said in the Hohn case which I have cited, it would make it extraordinarily difficult to obtain veniremen if they felt that investigations or inquiries of any kind would be made into their backgrounds as to whether they beat their wives or their husbands, whether they drank too much, whether they had ever visited a psychiatrist, whether they had been argumentative or passive in the jury room, whether they had been friendly or unfriendly with the other jurors; and the government submits, your Honor, that the Pandora's box which would be opened by the holding of the hearing, which is an independent step before the cause and effect relationship is inquired into between the alleged defect and the jury outcome, but the very process of holding a hearing is one which is extremely fraught with danger and which, on the basis of the evidence before the Court, ought not to take place.

The government submits, to sum up the point made earlier, that if the selection of the jury was proper and if there was an opportunity to ask the proposed panel the relevant questions and if the jury deliberations by all indications from notes coming from the jury and the apparent conduct of the jury give every indication of regularity, of meticulousness, of sensitivity and of rational thought, then the Court should not go behind that process and order a hearing into the competency of one of the jurors.

Thank you.

MR. GOLDBERG: Would I burden the Court if I took a couple of minutes?

Your Honor, Mr. Schaffer has of course misquoted the Silverman case. The Silverman case said "We would not hesitate to find prejudice." It didn't say that "the defendant must show that this particular juror said or did something which we would claim is prejudicial."

The mental infirmity st ands as a strong argument and a compelling argument that she lacked the proper intelligence to decide the case, and that's all Silverman said. Silverman said, "We wouldn't hesitate to find prejudice if it was the kind of defect that would adversely affect her ability to decide a case intelligently."

That's what it said. It didn't say we had to go into the deliberative process without the Court's permission and find out how she acted once in the jury room.

The Third Circuit case is interesting for this thought, your Honor. I believe the Third Circuit opinion says that in the voir dire of the selection of the jury counsel ought to be able to decide from the way the voir dire is conducted questions of competency in making a selection of a jury and in exercising. I believe the Third Circuit allows counsel to select or pose the questions to the people in the box themselves, and the judge doesn't ask questions, as is the practice in this district. I know when I tried cases in the Third Circuit I went with my adversary to a room and we selected the jury without the judge being present. So you have much more latitude in the Third Circuit, from my experience, and, of course, in the state courts, to root out any incapacity that would otherwise not be present where the Court --

THE COURT: I think that's a specious argument because counsel in the federal court have as much right to inquire in depth as they do in the Philadelphia court.

As a matter of fact, this Court is very definitely of a mind that repeatedly counsel were asked to submit any proposed questions on the voir dire. I have absolutely no recollection of counsel being cut off from any opportunity to request the Court to ask questions of the jury and, indeed, the contrary is true. Counsel did submit questions to the Court which were posed to the jury.

MR. GOLDBERG: Your Honor, forgive me if I have given any impression that the matter of the conduct of the voir dire --

THE COURT: I am not getting impressions. I don't think your argument in this area is valid.

MR. GOLDBERG: The only reason I raised it, and I might never have raised it, is that Mr. Schaffer pulled out a quotation from the Third Circuit opinion saying that the voir dire gave an adequate opportunity to determine the competency, if you will, of a juror.

THE COURT: Are you contending that in this court the voir dire does not provide an adequate opportunity to ferret out prejudice or other infirmities.

MR. GOLDBERG: I am just pointing out that there is a difference in the method by which the voir dire is conducted.

THE COURT: Assuming there is a difference, you still haven't answered my question.

MR. GOLDBERG: I would think, your Honor, and perhaps I put myself on the spot, and this has nothing to do, of course, with whether this juror is competent or not, laying that aside, I would think the state practice where you are able to question at length a juror eyeball to eyeball and talk to that juror as she sits in the box does give a better opportunity to discover the kinds of things that might cause you to feel that the juror either lacks the intelligence or is otherwise incapable of rendering efficient jury service.

I mean that as no criticism to your Honor, but if you are asking me now my own thoughts, having tried cases in various forums, I do think that when counsel stands up and is actually able to talk to the juror at length as he questions the juror, you do get a better opportunity.

Now, in the Third Circuit, where I was a prosecutor for some time, I would sit in a room with my adversary and the judge wouldn't be present and we would talk to the jury until we finally selected the panel. Only if a problem came up would we repair to the judge's chambers. Of course, sitting around a table in a room with just counsel present does give -- I don't see how that can be really contested -- does give a better opportunity, I think, to make an intelligent judgment.

I don't mean to stand up here and attack this system. I function very well under this system, and your Honor exercised latitude and the right that was accorded me to form or frame any questions. I am not contesting the way the voir dire was conducted.

THE COURT: Yet it seems to be the concensus of opinion developed in the case of every attack upon the voir dire system in the federal court that the voir dire system in the federal court is far superior to the eyeball to eyeball system that you have talked about and, as a matter of fact, many state courts, if my recollection serves me, have adopted the voir dire system utilized in the federal court because of its greater efficiency, and I have no recollection of any commentator or any member of the bar or the court of any stature saying that the voir dire system as practiced in the federal court is in any way a cutoff to counsel to examine fully and amply into the qualifications of a juror.

MR. GOLDBERG: Let me suggest this to you. If you recall, the State of New York changed their rules with respect to voir dire, and after some trial run they now have reverted back to the eyeball to eyeball method. They originally had used the eyeball to eyeball, if you will, and then about a year ago they changed to the federal system. It was met by so much comment from the state bar that it has now returned to what had been the state system because defense counsel thought that they stood a better chance of selecting a fair and impartial jury if they conducted it eyeball to eyeball, although the speed and the efficiency is there in the federal system.

I don't mean to attack the federal system. The only thing I say is that when Mr. McGuire points out that the voir dire is an opportunity and afforded counsel a good opportunity to make this determination and, of course, I question that even in a psychiatric situation because we are not doctors or psychiatrists, that the Third Circuit might very well be dealing with a situation where the voir dire is a bit different than the voir dire in the Southern District.

But be that as it may, your Honor, I submit to your Honor that the law doesn't support Mr. Schaffer's argument that there should be any different standard in determining competency whether the claim is one of mental infirmity as opposed to physical infirmity. The law is clear that if there is a mental infirmity, and it doesn't say insanity, but certainly a psychosis is a serious mental illness and would qualify as a mental infirmity.

In the Hohn case, I believe, cited by Mr. Schaffer, and if I am wrong I wouldn't mind being interrupted, but as my recollection is, that at the conclusion of the trial counsel spoke to one of the jurors or one of the jurors had mentioned to counsel something about the conduct of the contested juror. This is far different. In our case it rests upon documentary proof submitted to a host of psychiatrists not at all related, from different areas throughout this Metropolitan region, who are unanimous in their diagnosis and who point out in this rather unique case the serious risks that we face in allowing this person to be considered as a competent juror.

Now, there is a problem if you were to hold a hearing would this open the floodgates to other applications. Your Honor, I don't think it would because I don't know but I rather suspect there are no cases where an application like this has been grounded upon something in written form from a juror and so supported by the number of doctors that we have produced here; and something ought to be said for the fact that the government, with all its resources, has offered no counterproof from any medical authority but seeks just to close the issue by raising the very important consideration of the sanctity of the jury.

Of course, that's important. So, too, is the right of a defendant to a twelve-man panel of competent jurors. I would say, your Honor, this case hasn't happened before in the law reports where a juror has put her thoughts down in writing, and I don't know that it will happen again, but I don't think if you were to hold a hearing in this case that you are going to be confronted with a precedent that would cause problems in any future case. It hasn't come up before. This is a rather unique set of circumstances, and I would then, therefore, pray for the factual hearing.

MR. EDELBAUM: May I have a few more words, your Honor? I will be very brief.

I don't think the issue of whether or not the voir dire in the state court or the voir dire in the federal court has anything to do with this issue here, your Honor. So I am not going to even discuss that.

I agree with Mr. Schaffer we have to make a strong showing. I submit we have made a very strong showing.

Mr. Schaffer gave you an example. Suppose the neighbors had said something and that's all we had. Of course no psychiatrist could make a determination on what a neighbor says she heard a juror say, and of course that wouldn't be grounds for coming here. But here we have words out of her mouth, in her handwriting, by eminent psychiatrists who have unquestionably stated it is their opinion that she suffers from a mental infirmity which the statute says disqualifies a juror, and I cannot understand and the government has not even stated whether they have or have not, but I refuse to believe that with the capability that Mr. Schaffer and Mr. McGuire showed at this trial that at least they would have submitted this letter to one psychiatrist who would have come in here and given your Honor his opinion, and I say to your Honor that from my talk with one of my psychiatrists who I consulted after I saw this letter, he said to me, "If you gave this letter to a hundred psychiatrists they would have to arrive at the same opinion honestly."

So I say to your Honor we have made a strong showing to entitle us to a hearing.

Then the questions which follow thereafter as to your Honor's decision after you have had the hearing, that's another thing, but the least we are entitled to is a hearing, and I respectfully request that this hearing be granted.

THE COURT: Let me pose some hypothetical questions which I would hope that you would consider when I ask you for further briefing on this entire subject.

Should this Court order a hearing, what standard would you apply for a determination whether this juror had the kind of capacity necessary to arrive at a fair and impartial verdict?

Obviously some standard must be applied in order to make a finding.

The second question that I ask: In the event this Court were to order a hearing, wouldn't it be necessary to adduce testimony from each and every one of the jurors who served with the juror in question to determine how she behaved during the course of the deliberations, what was her demeanor, what was her conduct, what was her appearance, did she present a rational appearance or otherwise?

Now I come to still a third question. Does this Court have the authority, and I know that hasn't been raised and I have no recollection of any case that I have reviewed raising it, does this Court have the authority to order a competency hearing of this juror?

Now, I would like you to consider that and if you are not prepared to answer these questions, it would not surprise me, but, in any event, I would like some indication from you when this matter is briefed.

MR. EDELBAUM: May I answer that?

I think these questions are well posed. I think they should be well considered, and I don't think -- I think they are of importance enough for us to do research on this and to submit to your Honor a memorandum answering each of the questions, and I think that's important, and I agree with your Honor that that should be done at this time.

THE COURT: Well, I would like to reserve decision on this motion, but I would not do so unless the sentence here can be adjourned with the consent of counsel and the defendants in addition to a waiver of the speedy trial rules.

MR. EDELBAUM: Of course, your Honor.

MR. GOLDBERG: That is satisfactory, your Honor.

THE COURT: Mr. Dioguardi, do you consent to an adjournment of the sentence and do you understand that you have a right to oppose the adjournment of the sentence?

DEFENDANT DIOGUARDI: Yes, sir.

THE COURT: Do you waive all rights in that connection?

DEFENDANT DIOGUARDI: Yes.

THE COURT: Mr. Edelbaum?

MR. EDELBAUM: Mr. Ostrer?

DEFENDANT OSTRER: Yes, sir.

THE COURT: Do you understand what I am talking about?

DEFENDANT OSTRER: Yes, sir.

THE COURT: Decision is reserved and sentence is set for April the 12th at 10:00 A.M.

Now, Mr. Edelbaum, I think you also have a motion.

MR. EDELBAUM: Yes, your Honor.

May I rest on the memorandum and submit the motion? I have set in my memorandum quite clearly my reasons and, of course, I would say to Mr. Schaffer that, since these were only served yesterday, it would only be fair to him for your Honor to give him such opportunity as he wants to submit a reply memorandum. I think that would be the better practice.

MR. SCHAFFER: Your Honor, at this time the government has read Mr. Edelbaum's motion papers submitted to us yesterday, and it is the government's position that these papers raise no issue which wasn't thoroughly considered by the Court. We had meticulous question and answer periods and argumentation on the law and the facts in the robing room and at the side bar, and I believe your Honor has given careful consideration already to these issues and they do not require further response from the government.

THE COURT: I think that is correct, and your motion, Mr. Edelbaum, is denied.

MR. EDELBAUM: I have an exception.

THE COURT: Is there any further business by the Court?

MR. GOLDBERG: Your Honor, I have discussed with Mr. Schaffer the possibility of marking the writ satisfied so that the defendant Dioguardi can be returned to Danbury because that's where he receives his diet, and I think it is satisfactory to the government.

MR. SCHAFFER: No objection, of course, your Honor.

MR. GOLDBERG: Forgive me. I was incorrect when I represented he receives a diet. That is a subject of some contention. He is not receiving his proper diet. So let me correct the record on that. But Mr. McGuire or Mr. Schaffer has consented to the return.

THE COURT: Mark carefully that it is ordered that the juror who is the subject of this Rule 33 motion is not to be contacted by anybody or communicated with by anybody in any possible way, directly or indirectly. Is that clear, gentlemen?

MR. EDELBAUM: Yes, your Honor.

MR. GOLDBERG: Your Honor, I believe yesterday Mr. Schaffer said he would report back today on whether the juror has been contacted by any agency of the government.

MR. SCHAFFER: Your Honor, I made inquiry of Mr.

Wing, who you know is the chief of the frauds unit in our office. I have not spoken personally with Mr. McGuire. My present information is that no attempt has been made whatsoever to contact this juror and that no attempt is contemplated.

MR. EDELBAUM: May I make a suggestion, your Honor? I do not observe any member -- is there a member of the press here?

Your Honor, I would like to move to seal these papers until there is a decision, seal all the papers and seal the argument that has bone on here today.

THE COURT: So ordered.

MR. GOLDBERG: Your Honor, that is frustrated if the government or any other counsel file a memorandum in the clerk's office.

MR. EDELBAUM: There has been nothing filed in the clerk's office.

MR. GOLDBERG: We haven't.

MR. EDELBAUM: And we will not file it. We will just file it with the Court.

MR. GOLDBERG: I think it ought to be delivered to chambers, this memorandum.

THE COURT: Very well.

MR. EDELBAUM: Your Honor, I don't know what --

I think you could ask cooperation -- I don't know which newspaper is here, but I think you could ask their cooperation so it won't embarrass this lady.

THE COURT: Well, I have always found myself in the happy position of not having complaints about the press.

MR. EDELBAUM: I don't either, Judge.

THE COURT: We have had many serious trials in this court involving matters that might be of pervasive public interest, and at least speaking for myself in this court I have never had any problems and beyond saying that, I would do no more. I would hope that the press who are represented here, and I wasn't aware of that, are fu lly cognizant and aware of the situation and the possible dangers of damage to one who is at the moment, not part of these proceedings and involving statements concerning a condition which might have devastating effects upon her personal life, her position in the community, her job. I would hope that these considerations would weigh and bear very heavily with the press and that they would be most circumspect.

However, if the members of the press here have any questions to ask of me, I am perfectly ready and willing and hope to be able to answer them.

MR. EDELBAUM: Thank you, your Honor.

THE COURT: Very well.

THE CLERK: Court stands in recess.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Original filed
4-18-73

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UNITED STATES OF AMERICA :

-v- : Docket No. 71 Cr. 558

LOUIS OSTRER, : **NOTICE OF APPEAL**

Defendant. :

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Notice is hereby given that LOUIS OSTRER, the above named defendant, hereby appeals to the United States Court of Appeals for the Second Circuit, from the final judgment of conviction entered in this action on the 12th day of April, 1973, and from the Order of the same date denying a new trial.

Maurice Edelbaum

New York, New York
April 18, 1973

MAURICE EDELBAUM
Attorney for Defendant
230 Park Avenue
New York, New York 10017
(212) PE 2-1300

TO: Whitney North Seymour, Jr.
United States Attorney
Southern District of New York

Clerk
United States District Court
Southern District of New York

Mr. Louis Ostrer
181 Kings Pt. Road
Great Neck, New York

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UNITED STATES of America
v.
John DIOGUARDI and Louis Ostrer.
No. 71 Cr. 558.

United States District Court,
S. D. New York.
July 18, 1973.

Accused who had been convicted of violating federal securities laws and regulations and mail fraud statute moved for new trial on ground of one juror's alleged mental infirmity. The District Court, Edelstein, Chief Judge, held that juror's posttrial letter to one of the accused portraying juror as person with religious feelings who believed herself to be clairvoyant, and psychiatrists' opinions (which were not based upon a mental examination of the juror) concerning juror's mental condition were insufficient to justify hearing to determine whether juror had been qualified to serve or to order a new trial without such hearing.

Motion denied.

1. Mental Health ⚷18

There is a rebuttable presumption of continued incompetency of a juror who has been adjudged mentally incompetent prior to trial unless there has been restoration to competency. 28 U.S.C.A. § 1865(b)(4).

2. Mental Health ⚷17

An adjudication of incompetency does not determine a person's mental capacity prior to the determination though inference is clear that underlying causes of the incompetent condition existed before the adjudication.

3. Constitutional Law ⚷267

Where juror has been declared insane shortly after rendition of guilty verdict, due process requires that hearing be held to establish whether juror's disability existed during trial, and if it did exist, the effect it had on the juror's deliberations. 28 U.S.C.A. § 1865(b)(4).

4. Criminal Law ⚷997.15(2)

Party attacking juror's mental qualifications after rendition of verdict must make offer of proof which suggests that juror was insane, had been confined in a sanitarium or was so incapacitated that he did not perform as adequately as many people do ordinary occupational tasks; something more than bare statement of incompetency is demanded. Fed.Rules Crim.Proc. rule 33, 18 U.S.C.A.; 28 U.S.C.A. § 1865(b)(4).

5. Criminal Law ⚷997.16(3)

Letter which juror sent to defendant following conviction and which portrayed juror as person with religious feelings who believed herself to be clairvoyant and psychiatrists' opinions (which were not based upon a mental examination of the juror) concerning juror's mental condition based upon analysis of the letter and certain assumptions were insufficient to justify postverdict hearing to determine whether juror had been unqualified to serve or to order a new trial without such hearing, where no evidence was offered of a separate, unrelated determination of mental incompetency, presumption of sanity was not overcome and juror's demeanor during voir dire, trial and deliberations did not indicate that she was anything but competent. Fed.Rules Crim.Proc. rule 33, 18 U.S.C.A.; 28 U.S.C.A. § 1865(b)(4).

6. Criminal Law ⚷997.16(7)

Function of postverdict hearing to inquire into juror's mental qualifications is not to determine whether claimed disability does exist but rather is to ascertain extent to which disability existed during trial and the effect which the disability had upon juror's deliberations. 28 U.S.C.A. § 1865(b)(4).

7. Criminal Law ⚷868

Generally, court is inhibited from inquiring in any way as to what occurred during jury's deliberations.

8. Criminal Law ⚷957(1)

Jurors are incompetent to testify as to matters which would impeach their verdict.

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9. Criminal Law ⇐997.15(3)

Mere allegation of disability of juror or of wrongdoing or mere inclusion in panel of disqualified juror does not warrant postverdict disclosure of the debates, thoughts and notes of jury while considering their verdict.

10. Criminal Law ⇐997.16(3)

Without more, postverdict statements of a juror, reflecting certain beliefs considered by some to be unconventional, do not justify postverdict inquiry into jury's deliberations.

11. Criminal Law ⇐997.15(3)

Even if jurors are permitted to testify concerning jury deliberations, questions relating to motives and influences which affected deliberations would be improper.

Whitney North Seymour, Jr., U. S. Atty., S. D. N. Y.; Harold F. McGuire, Jr. and S. Andrew Schaffer, Asst. U. S. Attys., for plaintiff.

Jay Goldberg, and Edward S. Panzer, New York City, for defendant Dioguardi.

Maurice Edelbaum, New York City, for defendant Ostrer.

EDELSTEIN, Chief Judge.

OPINION

Defendants John Dioguardi and Louis Ostrer were indicted on May 27, 1971, and brought to trial on January 4, 1973, for conspiring to violate and for violating the federal securities laws[1] and regulations[2] and the federal mail fraud statute.[3] On January 26, 1973, after three days of deliberations, a jury returned verdicts of guilty against both defendants.[4] Defendants have now moved for a new trial, pursuant to F.R. Cr.P. 33,[5] on the ground that one of the jurors suffered from "a mental infirmity making her incapable of rendering efficient jury service" within the meaning of 28 U.S.C. § 1865(b)(4).[6]

In support of their motion, defendants rely upon a letter which was sent to

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[1] Section 17(a) of the Securities Act of 1933, prohibiting fraud in the sale of securities. 15 U.S.C. § 77q(a) (1970). Wilful violation of this section is made criminally punishable by section 24 of the Securities Act of 1933, 15 U.S.C. § 77x (1970).

[2] Securities and Exchange Commission Rule 10b-5, prohibiting fraud in the purchase and sale of securities. 17 C.F.R. Section 240.10b-5, promulgated under 15 U.S.C. § 78j(b) (1970). Wilful violation of this rule is made criminally punishable by section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78ff (1970).

[3] 18 U.S.C. § 1341 (1970), the federal mail fraud statute.

[4] The jury found Ostrer guilty of 11 of the 17 counts submitted to them for their consideration; and Dioguardi guilty of 4 of the 19 counts submitted to them for their consideration.

[5] Rule 33 of the Federal Rules of Criminal Procedure states:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.
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> As amended Feb. 28, 1966, eff. July 1, 1966.

[6] Section 1865(b)(4) states, in pertinent part:

> (b) In making such determination [whether a juror is qualified to serve] the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—
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> * * * * *
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> (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service. . . .

Dioguardi by the juror in question. The letter portrays the juror as a person with religious feelings who believes herself to be a clairvoyant. This clairvoyance, according to the letter, has enabled the juror to conclude that Dioguardi is basically a good person. (The juror repeated the phrase " . . . I saw the good within you . . ..") Nevertheless, the juror affirms her belief that Dioguardi is guilty ("Your mistake your [sic] guilty."); admonishes him for becoming involved with criminals ("Why you let such a relationship exist between you and a man like Hellerman?")[7] and suggests that he should repent and be saved. ("If you repent and run a clean business it is the good within you that will save you, and you will gain what you have lost.")

Defendants have also submitted six letters from six different psychiatrists and an affidavit from a seventh psychiatrist. Based only upon an analysis of the juror's letter and, in some instances, an assumption of the juror's religious feelings, cultural background and intelligence level, the doctors offered, in various ways, their opinion that the juror is, and was during trial, hallucinatory, delusional, psychotic, grandiose and suffered from guilt feelings and a persecution complex; and they attempted to make the legal determination that the juror was not mentally qualified to serve on a jury.

Defendants have requested that this court either (a) hold a hearing "with necessary mental examination" to determine whether the juror was unqualified to serve, and to grant a new trial "should the juror be found to have been unqualified;" or (b) grant a new trial even if the court refuses to hold a hearing.

The demand for a new trial based upon a postverdict attack on a juror's mental competency is an issue of first impression in this circuit. The problem, however, has been considered by the highest tribunals of fourteen states,[8] by an intermediate appellate court in one other state,[9] and by the Courts of Appeals for the First Circuit[10] and Third Circuit.[11] The decisions rendered by these courts all are to the effect that a post-verdict *inquiry* into a juror's mental competency will not be permitted unless the party

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7. Michael Hellerman was the admitted architect of the scheme for which the defendants were convicted and was a key witness for the prosecution.

8. *Arizona:* Anderson v. State, 54 Ariz. 387, 96 P.2d 281 (1939); *Arkansas:* Brown v. State, 219 Ark. 647, 243 S.W.2d 938 (1951); Grand Lodge A.O.U.W. of Ark. v. Wood, 113 Ark. 502, 168 S.W. 1070 (1914); *Colorado:* Austin v. People, 106 Colo. 506, 107 P.2d 798 (1940); *Georgia:* Wall v. State, 126 Ga. 549, 55 S.E. 484 (1906), (the Georgia Court of Appeals, an intermediate appellate court, reaffirmed the *Wall* decision in Newton v. State, 66 Ga.App. 103, 17 S.E.2d 102 (1941)); *Illinois:* Mackin v. People, 115 Ill. 312, 3 N.E. 222 (1885); *Indiana:* Douthitt v. State, 144 Ind. 397, 42 N.E. 907 (1896); *Massachusetts:* Commonwealth v. Jordan, 207 Mass. 259, 93 N.E. 809 (1911), aff'd. Jordan v. Massachusetts, 225 U.S. 167, 32 S.Ct. 651, 56 L.Ed. 1038 (1912); *Montana:* State v. Bucy, 104 Mont. 416, 66 P.2d 1049 (1937); *New Jersey:* Iverson v. Prudential Ins. Co. of America, 126 N.J.L. 280, 19 A.2d 214 (1941); Burik v. Dundee Woolen Co., 66 N.J.L. 420, 49 A. 442 (1901); *New Mexico:* State v. Eskildson, 36 N.M. 238, 13 P.2d 417 (1932); *Tennessee:* Durham v. State, 182 Tenn. 577, 188 S.W.2d 555 (1945); *Texas:* Ex Parte Lovelady, 152 Tex.Cr.R. 93, 207 S.W.2d 396 (1947), cert. granted 333 U.S. 867, 68 S.Ct. 787, 92 L.Ed. 787, cert dismissed 333 U.S. 879, 68 S.Ct. 914, 92 L.Ed. 1154 (1948); McKenzie v. State, 116 Tex.Cr.R. 395, 11 S.W.2d 172 (1928); Carter v. State, 102 Tex.Cr.R. 517, 278 S.W. 840 (1925); *Washington:* State v. Welty, 65 Wash. 244, 118 P. 9 (1911); *West Virginia:* State v. Camp, 110 W.Va. 444, 158 S.E. 664 (1931).

9. *Missouri:* Eastman Kodak Stores, Inc. v. Summers, 377 S.W.2d 476 (Kan.City, Mo.App. 1964).

10. Peterman v. Indian Motorcycle Co., 216 F.2d 289 (1st Cir. 1954).

11. United States ex rel. Daverse v. Hohn, 198 F.2d 934 (3rd Cir. 1952), cert. denied 344 U.S. 913, 73 S.Ct. 336, 97 L.Ed. 704 (1953).

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seeking to set aside the jury's verdict makes a strong showing as to the existence of the alleged mental infirmity. At a minimum, this showing should be sufficient to overcome the legal presumption that all men are sane.[12] An analysis of the relevant cases reveals no precise formula by which to measure the standard of proof necessary to warrant a post-verdict investigation. They do reveal, however, a difference between a sufficient and an insufficient showing.

[1] These cases can be divided into three categories, ranging in degree from the strongest to the weakest showings which have been made in attacking a juror's competency. The strongest showing is illustrated by fact patterns in those cases in which the juror, prior to trial, had been adjudged mentally incompetent; had spent time in a hospital for the mentally ill; and had not been legally restored to competency during the period of his jury service. In such cases, the mere adjudication of incompetency, without a restoration to competency, regardless of the period of time which had elapsed between the date of the adjudication and the date of jury service, was sufficient to overcome the presumption that the juror was sane during the trial.[13] In these circumstances, the courts have held a post-verdict investigation to ascertain the extent to which the disability existed during trial, and the effect the disability had on the juror's consideration of the facts of the case.[14]

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12. *See, e. g.* Davis v. United States, 165 U.S. 373, 377–378, 17 S.Ct. 360, 41 L.Ed. 750 (1897); Davis v. United States, 160 U.S. 469, 486–487, 16 S.Ct. 353, 40 L.Ed. 499 (1895); State v. Camp, 110 W.Va. 444, 158 S.E. 664, 667 (1931).

13. Indeed, unless there has been a restoration to competency, there is a rebuttable presumption of continued incompetency. Davis v. United States, 165 U.S. 373, 377–378, 17 S.Ct. 360, 41 L.Ed. 750 (1897); Tarvestad v. United States, 418 F.2d 1043, 1050–1051 (8th Cir. 1969), cert. denied 397 U.S. 935, 90 S.Ct. 944, 25 L.Ed.2d 116 (1970); Hurt v. United States, 327 F.2d 978, 981 (8th Cir. 1964); Kitchens v. United States, 272 F.2d 757, 760 (10th Cir. 1959), cert. denied, 362 U.S. 942, 80 S.Ct. 809, 4 L.Ed.2d 772 (1960); Gunther v. United States, 94 U.S.App.D.C. 247, 215 F.2d 493, 496 n. 12 (1954); Brown v. State, 219 Ark. 647, 243 S.W.2d 938, 939 (1951); State v. Bucy, 104 Mont. 416, 66 P.2d 1049, 1050 (1937).

14. *For example*, in Anderson v. State, 54 Ariz. 387, 96 P.2d 281 (1939), the juror, several months before trial, had been formally declared incompetent to manage his business affairs and had remained under the disability throughout the trial. At the hearing evidence was adduced which indicated that the juror was an alcoholic, that his business was being ruined as a result of his affliction, that his income was being consumed by his habit, and that the declaration of incompetency was an attempt to save both his money and his business. The court further found that when sober the juror was of sound mind and normal intelligence. Declaring that "there was nothing to show that at the time of trial his condition was not normal," (96 P.2d at 283) the court held that the juror's disability did not adversely affect his ability to properly perform the functions of a juror. For other cases involving pretrial adjudications of incompetency in which the court conducted a post-verdict investigation, *see* Grand Lodge A.O.U.W. of Ark v. Wood, 113 Ark. 502, 168 S.W. 1070 (1914) ("several months" before trial the juror had been declared insane; had been sent to a mental hospital; had remained there for "a short period;" and had been "paroled;" but had never been "legally emancipated from the disability of insanity"); Austin v. People, 106 Colo. 506, 107 P.2d 798 (1940) (16 months before trial, the juror had been adjudged a mental incompetent, but had never been institutionalized nor restored to competency); Brown v. State, 219 Ark. 647, 243 S.W.2d 938 (1951) (approximately 2 years before trial the juror had been adjudged insane by the probate court; had been confined in a mental hospital for 3 months; and had been released without a judicial restoration to sanity); Ex Parte Lovelady, 152 Tex.Cr.R. 93, 207 S.W.2d 396 (1947), cert. granted, 333 U.S. 867, 68 S.Ct. 787, 92 L.Ed. 787, cert. dismissed 333 U.S. 879, 68 S.Ct. 914, 92 L.Ed. 1154 (1948) (the juror had been adjudged insane approximately 7 years before the trial, had been confined in a hospital for the insane; and had been discharged "soon after his confinement" without hav-

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[2, 3] The second category of cases involves jurors who have been declared insane shortly after the verdict was rendered. The adjudications were by an independent tribunal, and the proceedings were completely unrelated to the post-verdict investigation of the jurors' qualifications. As in the first category of cases, the presumption of sanity had been overcome. However, an adjudication of incompetency does not determine a person's mental capacity prior to the determination. Yet, the inference is clear that the underlying causes of the incompetent condition existed before the adjudication. Thus, in this category of cases, due process requires[15] that there be a hearing to establish whether the disability existed during trial, and if it did exist, the effect it had on the juror's deliberations.[16]

Absent the type of showing demonstrated in the first two categories, the courts have been extremely reluctant to invade the privacy of the jury room. Thus, the Court of Appeals for the First Circuit, in Peterman v. Indian Motorcycle Co., 216 F.2d 289 (1st Cir. 1954), the Court of Appeals for the Third Circuit, in United States ex rel. Daverse v. Hohn, 198 F.2d 934 (3rd Cir. 1952), and the Supreme Court of New Mexico, in State v. Eskildson, 36 N.M. 238, 13 P.2d 417 (1932), approved the trial court's refusal to hold an evidentiary hearing absent an adjudication of incompetency. In *Peterman*, the movants offered to prove that

> . . . the juror in question, because of mental disturbance, [had] been receiving disability compensation from the Veterans Bureau, that he

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ing been legally restored to sanity); Douthitt v. State, 144 Ind. 397, 42 N.E. 907 (1896) (the juror had been confined for a short period in an "insane hospital" approximately 8 years before trial and had been discharged as "improved"); State v. Bucy, 104 Mont. 416, 66 P.2d 1049 (1937) (approximately 10 years before trial the juror had been declared insane; had been confined in an insane asylum for less than 2 months; and had been released but had never been judicially restored to competency); Eastman Kodak Stores, Inc. v. Summers, 377 S.W.2d 476, 481 (Kan.City, Mo.App. 1964) (approximately 20 years before trial the juror had been "adjudicated to be a person of unsound mind and had never been restored;" and had, thereafter, been treated for epilepsy). Three other cases involved similar facts, but no time periods were stated. Durham v. State, 182 Tenn. 577, 188 S.W.2d 555 (1945); Carter v. State, 102 Tex.Cr.R. 517, 278 S.W. 840 (1925); Newton v. State, 66 Ga.App. 103, 17 S.E.2d 102 (1941).

[15] Jordan v. Massachusetts, 225 U.S. 167, 174, 32 S.Ct. 651, 56 L.Ed. 1038 (1912) aff'g. Commonwealth v. Jordan, 207 Mass. 259, 93 N.E. 809 (1911). In Jordan, the juror was found to be insane and was committed to an "insane hospital" four days after the verdict was rendered. After a lengthy hearing the presiding justice denied defendant's motion for a new trial, ruling that "a fair preponderance of all the evidence" indicated that the juror was possessed of "sufficient mental capacity during the entire trial" to enable him to render an intelligent verdict. Quoted in 93 N.E. at 814. Both the Supreme Judicial Court of Massachusetts and the United States Supreme Court affirmed. Although the precise question before the Supreme Court involved the propriety of using the "preponderance of the evidence" standard, the Court noted that the holding of a hearing complied with the due process requirement.

[16] State v. Camp, 110 W.Va. 444, 158 S.E. 664 (1931) (the juror became insane the day after the verdict was rendered and was hospitalized two weeks thereafter); Burik v. Dundee Woolen Co., 66 N.J.L. 420, 49 A. 442 (1901) (the juror became insane "some days" after the verdict); Iverson v. Prudential Ins. Co. of America, 126 N.J.L. 280, 19 A.2d 214 (1941) (the juror began evidencing symptoms of a mental illness 6 days after the trial's conclusion and was declared, 2 days later, to be suffering from a type of insanity "which conjures up an imaginary world and results in a loss of 'contact with reality.'" 19 A.2d at 218); State v. Welty, 65 Wash. 244, 118 P. 9 (1911) (the juror had been twice adjudged insane and committed to an insane asylum prior to trial; had not been restored to sanity at the time of trial; and 5 months after trial had been re-committed to the asylum).

> [had] difficulty in sleeping and concentrating; that his memory [was] not good; that he [had] had depressed periods during which he entertained the idea of suicide; *that he [had] had to undergo treatment for anxiety reaction to a psychic episode expressed by auditory hallucinations; that he has been under the care of a psychiatrist for an extended period, with little prospect of an early overcoming of his difficulties.*

216 F.2d at 293 (emphasis added). Yet, Judge Wyzanski of the United States District Court for the District of Massachusetts refused to hold an evidentiary hearing. According to the opinion of the Court of Appeals, Judge Wyzanski's reason was based upon the fact that the offer of proof, "taken at its face value," did not present "a sufficient ground for impeaching a verdict once returned" because it "contained no suggestion that the juror was insane or had at any time been confined in a sanitarium 'or was so incapacitated that he did not perform as adequately as many people do ordinary occupational tasks.'" *Id.* The Court of Appeals noted that Judge Wyzanski observed the juror during the trial and that he did not get the impression that the juror was incompetent. In its affirmance, the Court of Appeals indicated its approval of "the strong policy against the too-ready impeachment of jury verdicts on the basis of such afterthoughts suggested by a disappointed litigant." *Id.*

Similarly, in *Eskildson*, defendant sought to establish a juror's mental incompetency through the testimony of a psychiatrist. The trial court, however, refused to hold an evidentiary hearing because there had not been "an adjudication that settled [the juror's] status." 13 P.2d at 421. The Supreme Court of New Mexico, while sanctioning the adjudication requirement adopted by the trial court, suggested that a hearing might also be appropriate if the trial judge believed, based upon his observations of the juror during trial, that the juror was incompetent.[17]

[4] Finally, the Third Circuit's opinion in *Daverse*, although not precisely on point, is consonant with the policy reflected in *Peterman* and *Eskildson*. In *Daverse*, the defendant attempted to amend a paragraph of a petition for habeas corpus by adding an allegation that the juror suffered from a mental disease. This proposed amendment, however, was framed in uncertain, rather than specific, language (". . . [the] juror . . . *may* be suffering from a mental disease. . . .") 198 F.2d at 937 (emphasis added). Focusing upon the failure to allege "specifically that [the juror] was in fact mentally incompetent or 'insane,'" the Court of Appeals affirmed the District Court's refusal to allow the amendment. In so doing, the court stated:

> If a juror's mental competence is to be attacked at the late stage offered by a habeas corpus proceeding, the charge must be made in much more certain terms and not on a tentative basis. A fishing expedition into a juror's competency may not be employed as a basis to attack a conviction valid on its face. To rule otherwise would be to strike a serious blow at the sanctity of the jury system for any juror, who it was alleged might be suffering from paranoid tendencies, could in effect be put on trial as to his mental competence. We cannot sanction such a course.

198 F.2d at 938 (citation omitted). Clearly, something more than just a bare statement of incompetency is de-

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[17] *But see*, McKenzie v. State, 116 Tex. Cr.R. 395, 11 S.W.2d 172 (1928) in which a post-verdict inquiry was conducted notwithstanding the absence of an adjudication of incompetency. The juror's mental competence was challenged on the basis of an application, filed by the juror, "for compensation on the ground of nervous and mental disability incurred during the World War." 11 S.W.2d at 179. It does not appear that the parties put into issue the propriety of conducting a post-verdict investigation.

manded. At a minimum, a party attacking a juror's qualifications must make an offer of proof which, as the First Circuit stated, suggests "that the juror was insane or had at any time been confined in a sanitarium 'or was so incapacitated that he did not perform as adequately as many people do ordinary occupational tasks.'" 216 F.2d at 293. It would be myopic to read the *Daverse* opinion as requiring anything less than a strong showing of mental incapacity. It makes little difference, absent such a strong showing, whether movants charge that a juror *is* suffering from a mental disease or that the juror *may be* suffering from a mental disease. In both instances, the effect of defendant's attack is the same: permission to employ a "fishing expedition into a juror's competency" would be required. Such an expedition cannot be tolerated.

[5] A comparison of the offer of proof in the case at bar with the offers made in the cases above should make it abundantly clear that the defendants' offer of proof is insufficient to warrant a post-verdict inquiry into the juror's mental competency. Since there has been no adjudication of incompetency, this case comes within the weakest of the three categories discussed above. Even within this category, the showing is extremely weak. In *Peterman*, for example, the offer of proof was much stronger than the offer made here. There, the allegations were, in effect, that the juror had a history of mental disturbances, and had been, prior to and throughout the trial, under the care of a psychiatrist. Yet, Judge Wyzanski and the First Circuit were in accord that these allegations, even if true, would not warrant the impeachment of the verdict. 216 F.2d at 293. Here, there is no indication that the juror has a history of psychiatric disorders or that the juror has undergone psychiatric treatments. At best, the defendants' position is comparable with the defendant's position in *Daverse:* A bare allegation of incompetency combined with a request that the court conduct an investigation. To permit a post-verdict inquiry based upon defendants' offer of proof would be to accept the proposition that a fishing expedition may be employed to attack a conviction valid on its face. This cannot be countenanced, particularly in light of *Peterman* and *Daverse*.

[6] Moreover, based upon an examination of the general case law governing a post-verdict inquiry into a juror's qualifications, it is clear that a hearing is not required. The purpose of a hearing is not to determine whether or not the claimed disability does exist. Rather, the function of a hearing is to ascertain the extent to which the disability existed during trial, and the effect the disability had upon the juror's deliberations. This view finds support in the Supreme Court's opinion in Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954). During the trial in *Remmer*, an improper communication was made to a juror and was reported immediately to the court. Improper communications, such as those involved in *Remmer*, have been deemed to be so presumptively prejudicial as to require a new trial.[18] Yet, the trial court never informed the defendant-petitioner of the incident. Instead, based upon the results of a requested F.B.I. investigation, the court concluded that the incident was harmless. Upon learning of these events after trial, the defendant-petitioner moved for a new trial. Without holding a hearing, the trial court denied the motion and the Ninth Circuit affirmed. 205 F.2d 277 (9th Cir. 1953). The Supreme Court, however, held that a hearing was necessary—not to deter-

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[18] This principle had been enunciated prior to *Remmer*, Mattox v. United States, 146 U.S. 140, 148–150, 13 S.Ct. 50, 36 L.Ed. 917 (1892); Morley v. Cranmore Skimobiles, 67 F.Supp. 812 (D.N.H.1946); and has been reaffirmed since *Remmer*, Parker v. Gladden, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966) (per curiam); Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959).

mine whether the incident occurred—but rather to "determine the circumstances [surrounding the incident], the impact thereof upon the juror, and whether or not it was prejudicial." 347 U.S. at 230, 74 S.Ct. at 451.

This concept of the limited purpose of a hearing is also suggested by the Second Circuit's decision in United States v. Silverman, 449 F.2d 1341 (2d Cir. 1971). There the court indicated that a hearing would be necessary—again, not to determine whether a claimed disqualification existed—but rather to determine whether "the claimed disqualification might have adversely affected the challenged juror's ability to decide the case intelligently." 449 F.2d at 1344. In *Silverman,* an income tax evasion case, the juror's inability to read and write English was not disputed. At the hearing, therefore, the only question facing the court was whether this disability precluded the juror from rendering a fair and impartial verdict.

Similarly, in other cases involving a post-verdict attack upon a juror's qualifications, the existence of the disabling condition was not in issue, for the factors relied upon as being responsible for the disabling condition were readily evident.[19] Thus, where the juror suffered from a physical impairment, the existence of the impairment was not disputed. Where the juror was unable to read or write, this inability was not controverted. Where the juror was an alien, infant or convicted felon, the alienage, infancy or conviction of the juror was not in issue. Where the juror had engaged in some form of misconduct, the fact that the misconduct occurred was not questioned. And where the juror's mental competency was determined in a separate and unrelated proceeding, mental capacity was not contested. What was questioned and what was contested though, was the extent to which the disqualifying factor tainted a juror's deliberations and prevented him from rendering a fair and impartial verdict.

[7, 8] In the instant case, however, where the juror's competency has not been determined in a separate and unrelated proceeding, the court would be constrained to perform the additional task of delving into the mind of the juror and making the initial determination of whether or not the juror was mentally competent.[20] Such a probe was not un-

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[19] *See, e. g.,* Raub v. Carpenter, 187 U.S. 159, 161–162, 23 S.Ct. 72, 47 L.Ed. 119 (1902) (infancy, felony conviction); United States v. Silverman, 449 F.2d 1341 (2nd Cir. 1971) (inability to read and write English); United States v. De Leon, 462 F.2d 170 (5th Cir. 1972) (juror under indictment); Holmes v. United States, 284 F.2d 716 (4th Cir. 1960) (improper communications to jury); Ford v. United States, 201 F.2d 300 (5th Cir. 1953) (juror convicted of felony); Ryan v. United States, 89 U.S. App.D.C. 328, 191 F.2d 779 (1951), cert. denied sub. nom., Duncan v. United States, 342 U.S. 928, 72 S.Ct. 368, 96 L.Ed. 691 (1951) (improper communications to jurors); Faith v. Neely, 41 F.R.D. 361 (N.D.W.Va.1966) (juror misconduct, intoxication); Hollingsworth v. Duane, 4 U.S. (4 Dall.) 353, 1 L.Ed. 864 (Pa.Dist.1801) (alienage); Lindsey v. State, 189 Tenn. 355, 225 S.W.2d 533 (1949) (deafness); Batson v. State, 216 Ala. 275, 113 So. 300 (1927) (alienage).

[20] Although the defendants have requested that the juror undergo a mental examination, it is highly doubtful whether the court has the authority to order such an examination. The Supreme Court has held that federal courts do not have the common law power to order such an examination; Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734 (1891); *see also* Sibbach v. Wilson & Co., 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1941); Camden and Suburban Ry. Co. v. Stetson, 177 U.S. 172, 20 S.Ct. 617, 44 L.Ed. 721 (1900); and no statute can be found which authorizes it. Indeed, in civil cases, the court may only order, upon a motion for good cause, a party or a person under the legal control of party to submit to a mental examination. F.R.Civ.P. 35(a). *See, e. g.* Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). Similarly, in criminal cases, only the defendant is subject to the court's control. 18 U.S.C. §§ 4244, 4245. *See also* Rees v.

dertaken in *Peterman*, *Eskildson* and *Daverse*; and the court would be ill-advised to undertake such a probe here. Testimony would be necessary at the very least, not only from the subject juror regarding her deliberations, but also from her fellow jurors, regarding the nature and extent of the subject juror's participation in the deliberations.[21] Yet, such a probe militates against the well-established general rule which inhibits a court from inquiring "in any way whatever as to what occurred during the jury's deliberations." United States v. Grieco, 261 F.2d 414, 415 (2nd Cir. 1958), cert. denied 359 U.S. 907, 79 S.Ct. 582, 3 L.Ed.2d 572 (1959). Indeed, it is axiomatic that jurors are incompetent to testify as to matters which would impeach their verdict, regardless of the means employed.[22] Hence, courts have consistently refused to consider letters and affidavits of jurors which attempt to impeach their verdict.[23]

These general rules, however, are not absolute. The Supreme Court, having recognized that the adherence to inflexible rules is incompatible with the administration of justice, has relaxed the rigidity of these rules in order to protect the defendant's Sixth Amendment right to a fair and impartial jury. McDonald v. Pless, 238 U.S. 264, 268–269, 35 S.Ct. 783, 59 L.Ed. 1300 (1915). Nonetheless, post-verdict inquiries remain limited to extraordinary circumstances in which fundamental incompetency or actual bias is shown.[24] Thus, to come within this high standard, "[t]here must be a showing of a *prima facie* case sufficient to satisfy the judge that the [exposure of the jury's discus-

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Peyton, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1965) (per curiam); United States v. Baird, 414 F.2d 700, 710 (2d Cir. 1969), cert. denied, 396 U.S. 1005, 90 S.Ct. 559, 24 L.Ed.2d 497 (1970); United States v. Driscoll, 399 F.2d 135 (2d Cir. 1968); United States v. Albright, 388 F.2d 719, 722–724 (4th Cir. 1968); Alexander v. United States, 380 F.2d 33, 39 (8th Cir. 1967); Pope v. United States, 372 F.2d 710, 721 (8th Cir. 1967) (en banc), vacated and remanded on other grounds, 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317 (1968). No authority has been cited—indeed, no authority has been found—which permits the court to order a person who is neither a party nor a person under the control of a party in a judicial proceeding, to undergo a mental examination.

[21] It has been held that where a juror was able "to intelligently consider the evidence, appreciate the arguments of counsel, the rulings of law, the charge of the court, and to arrive at a rational conclusion," a new trial will not be granted. Commonwealth v. Jordan, 207 Mass. 259, 93 N.E. 809, 814–815 (1911), aff'd Jordan v. Massachusetts, 225 U.S. 167, 32 S.Ct. 651, 56 L.Ed. 1038 (1912). See Ex Parte Lovelady, 152 Tex.Cr.R. 93, 207 S.W.2d 396, cert. granted, 333 U.S. 867, 68 S.Ct. 787, 92 L.Ed. 787, cert. dismissed, 333 U.S. 879, 68 S.Ct. 914, 92 L.Ed. 1154 (1948); Anderson v. State, 54 Ariz. 387, 96 P.2d 281, (1939); State v. Camp, 110 W.Va. 444, 158 S.E. 664 (1931); Burik v. Dundee Woolen Co., 66 N.J.L. 420, 49 A. 442 (1901); Mackin v. People, 115 Ill. 312, 3 N.E. 222 (1885). *See also* United States v. Silverman, 449 F.2d 1341, 1344 (2nd Cir. 1971) (in which the Court of Appeals stated that a juror must be able "to decide a case intelligently"); Ford v. United States, 201 F.2d 300, 301 (5th Cir. 1953). In those circumstances in which a hearing might be required, testimony from the subject juror and the other jurors would be necessary to determine whether a juror deliberated intelligently.

[22] McDonald v. Pless, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915); Hyde v. United States, 225 U.S. 347, 32 S.Ct. 793, 56 L.Ed. 1114 (1912); Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892).

[23] The refusal to receive affidavits from jurors attempting to impeach their verdict can be traced to Lord Mansfield's ruling in 1785, Vaise v. Delaval, 1 T.R. 11 (1785); and has been "universally followed" in this country. *McDonald*, 238 U.S. at 268, 35 S.Ct. 783.

[24] *See, e. g.* Dennis v. United States, 339 U.S. 162, 168, 70 S.Ct. 519, 94 L.Ed. 734 (1950); Frazier v. United States, 335 U.S. 497, 512–514, 69 S.Ct. 201, 93 L.Ed. 187 (1948); Mattox v. United States, 146 U.S. 140, 12 S.Ct. 50, 36 L.Ed. 917 (1892); United States v. Silverman, 449 F.2d 1341, 1344 (2nd Cir. 1971); Ford v. United States, 201 F.2d 300, 301 (5th Cir. 1953).

sions during deliberations] should be let in." Clark v. United States, 289 U.S. 1, 14, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1932). The alleged disability must be "so obvious a disqualification or so inherently prejudicial as a matter of law . . . to require the court, of its own motion or on petitioner's suggestion afterward to set the verdict aside and grant a new trial." [25]

[9, 10] It has been said that the showing must be of a "constitutional dimension." United States v. Provenzano, 240 F.Supp. 393, 408 (D.N.J.); aff'd per curiam 353 F.2d 1011 (3rd Cir. 1965), cert. denied, 384 U.S. 905, 86 S. Ct. 1340, 16 L.Ed.2d 358 (1966). The mere allegation of the existence of a disability, the "mere charge of a wrongdoing . . . without more," United States v. Clark, 289 U.S. 1, 14, 53 S.Ct. 465, 77 L.Ed. 993 (1933), the mere inclusion in the panel of a disqualified juror, United States v. Silverman, 449 F.2d 1341, 1344 (2d Cir. 1971), does not warrant the disclosure of the debates, thoughts and votes of the jury while considering their verdict.[26] Clearly, post-verdict statements of a juror, without more, which reflect certain beliefs, considered by some to be unconventional, neither meet the high standards mandated by the Supreme Court and the Second Circuit; or justify tearing down the veil of secrecy which properly protects the jury's deliberations.

[11] Furthermore, if the jurors were permitted to testify, questions relating to the motives and influences which affected their deliberations would be improper. As Judge Timbers has pointed out

> Few doctrines are more firmly established in our jurisprudence than the proposition that the validity of a verdict may not be attacked, and hence a new trial will not be granted, upon a showing of the mental operations and emotional reactions of jurors in reaching a particular verdict.

United States v. Reed, 313 F.Supp. 451, 454 (D.Conn.1970). This rule, which was adopted by the Supreme Court in Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892), has been consistently reaffirmed both by the Supreme Court[27] and the Second Circuit.[28] *Mattox* drew the distinction

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[25] Frazier, 335 U.S. at 513, 69 S.Ct. at 210. *See also* Clark, 289 U.S. at 14; 53 S.Ct. 465; *McDonald*, 238 U.S. at 268–269; 35 S.Ct. 783; *Mattox*, 146 U.S. at 149, 13 S.Ct. 50.

[26] Even the "mere opportunity for prejudice or corruption" may not be a sufficient showing. As Mr. Justice Holmes stated in Holt v. United States, 218 U.S. 245, 251, 31 S.Ct. 2, 6, 54 L.Ed. 1021 (1910), "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain a jury trial under the conditions of the present day."

[27] Stein v. New York, 346 U.S. 156, 178, 73 S.Ct. 1077, 97 L.Ed. 1522 (1952); Hyde v. United States, 225 U.S. 347, 382–384, 32 S.Ct. 793, 56 L.Ed. 1114 (1911); Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892).

[28] Miller v. United States, 403 F.2d 77, 83–84 n. 11 (2nd Cir. 1968); United States v. Crosby, 294 F.2d 928 (2nd Cir. 1961), cert. denied sub nom. Mittelman v. United States, 368 U.S. 984, 82 S.Ct. 599, 7 L.Ed.2d 523 (1962); United States v. Grieco, 261 F.2d 414 (2nd Cir. 1958), cert. denied, 359 U.S. 907, 79 S.Ct. 582, 3 L.Ed.2d 572 (1959); Rotondo v. Isthmian Steamship Co., 243 F.2d 581, 583 (2nd Cir.), cert. denied, 355 U.S. 834, 78 S.Ct. 53, 2 L.Ed.2d 45 (1957); United States v. Reed, 313 F.Supp. 451, 454 (D.Conn.1970), aff'd 437 F.2d 57 (2nd Cir. [illegible]). Other circuits have also continued to follow this rule. *See, e. g.* Armstrong v. United States, 228 F.2d 764, 769 (8th Cir.), cert. denied, 351 U.S. 918, 76 S.Ct. 710, 100 L.Ed. 1450 (1956); Rakes v. United States, 169 F.2d 739, 745 (4th Cir.) cert. denied 335 U.S. 826, 69 S.Ct. 51, 93 L.Ed. 380 (1948); Young v. United States, 163 F.2d 187, 188–190 (10th Cir.), cert. denied 332 U.S. 770, 68 S.Ct. 83, 92 L.Ed. 355 (1947). The ABA Project on Minimum Standards for Criminal Justice approved in 1968 the following standard relating to impeachment of a verdict:

> Upon an inquiry into the validity of a verdict, no evidence shall be received to show the effect of any statement, conduct, event or condition upon the

between proper and improper testimony: testimony as to *objective* matters ("any facts bearing upon the question of the existence of any extraneous influences") was declared to be proper; however, testimony as to *subjective* matters ("how far that influence operated upon his [the juror's] mind") was deemed to be improper. 146 U.S. at 149, 13 S.Ct. at 53.

The refusal of the Second Circuit to deviate from this rule is amply supported by their decisions. In Rotondo v. Isthmian Steamship Co., 243 F.2d 581 (2d Cir. 1957), a *per curiam* opinion, the court refused to allow a post-verdict examination of the jury, stating

> it is completely well settled that, when objection rests upon the jurors' testimony as to what were the reasons that in fact induced them to find their verdict, the court will not hear them.

243 F.2d at 583 (citations omitted). Moreover, in United States v. Crosby, 294 F.2d 928 (2d Cir. 1961), cert. denied sub nom. Mittelman v. United States, 368 U.S. 984, 82 S.Ct. 599, 7 L.Ed.2d 523 (1962), the *Mattox* subjective-objective limitation on the scope of inquiry was specifically relied upon in rejecting a request for a post-verdict examination of jurors. In *Crosby,* the defendants claimed that the jury's deliberations were tainted by the use and knowledge of information obtained from news accounts. Citing *Mattox*, the Court of Appeals acknowledged that juror testimony could be received "to prove the fact that they read the newspaper[s]," 294 F.2d at 949, but not to establish the effect of such knowledge upon their reasoning.[29] Thus, as Judge Friendly declared in Miller v. United States, 403 F.2d 77 (2d Cir. 1968), "any relaxation of the *Mattox* rule" relating to a post-verdict inquiry into a juror's mental process would be viewed with "apprehension" by this court. 403 F.2d at 84 n. 11.

Continued adherence to these rules is reasonable. To permit a disappointed litigant to distort certain facts, innocent on their face, as a basis for attacking a jury's verdict, would be to open the proverbial Pandora's box. As Judge Smith said in *Crosby,* and Judge Friendly subsequently adopted in *Miller,*

> There are many cogent reasons militating against post-verdict inquiry into jurors' motives for decision. The jurors themselves ought not be subjected to harassment; the courts ought not be burdened with large numbers of applications mostly without real merit; the chances and temptations for tampering ought not be increased; verdicts ought not be made so uncertain.

United States v. Crosby, 294 F.2d at 950; Miller v. United States, 403 F.2d at 82.[30] In addition, to permit a verdict to be reopened without a sufficient basis in fact would be to seriously impair the integrity of a verdict. And, by diluting the efficacy of a jury's pronouncement, the constitutional guarantee of trial by jury, asserted by defendants, would also be weakened; for the integrity of a jury's verdict is an undeniable cornerstone of this Sixth Amendment right. *Cf.* United States ex rel. Daverse v. Hohn, 198 F.2d 934, 938 (3rd Cir. 1950). Therefore, before an assault on a verdict

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> mind of a juror or concerning the mental processes by which the verdict was determined.

ABA Project on Minimum Standards for Criminal Justice, Trial by Jury, § 5.7(a) (1968).

[29] The Court of Appeals held that the refusal to "examine the jurors as to their mental process" was not error by the district court. 294 F.2d at 950.

[30] In State v. Kociolek, 20 N.J. 92, 118 A.2d 812 (1955), the Court stated:

> The better reasoned decisions support the exclusion of jurors' testimony as to their mental processes . . . upon the sounder ground that, being personal to each juror, the working of the mind of any of them cannot be subjected to the test of other testimony, and therefore . . . such testimony should not be received to overthrow the verdict to which all assented.

118 A.2d at 816 (citations omitted).

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receives judicial approval, the Supreme Court's warning in McDonald v. Pless should be considered:

> But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

238 U.S. at 267–268, 35 S.Ct. at 784.

Considering the instant case, I do not believe that the facts justify the reopening of the jury's verdict. Defendants have not offered any evidence of a separate, unrelated determination of mental incompetency. Nor have they sustained their burden of overcoming the presumption of sanity which protects the juror. The most that can be said of their shallow showing is that it invites a "fishing expedition into a juror's competency." This cannot be countenanced. Moreover, there was nothing in the demeanor of the juror during *voir dire*, trial or deliberations to indicate that she was anything but competent to serve on the jury. On *voir dire*, the jurors were asked group questions in an effort to elicit from them their feelings of bias or prejudice which would prevent them from rendering a fair and impartial verdict.[31] In direct colloquy with me, the juror answered directly and responsively, stating that she understood my

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[31] The jurors were asked the following group questions relating to bias and prejudice:

> Does any juror have any mental reservation as to the acceptance of these principles of law?
>
> And I would assume in response to each and every one of my questions that your silence indicates that you do not.
>
> Do you have any preconceived ideas or prejudices that would prevent or hinder you from following the instructions that the Court will give you in greater detail at a later time and the principles of law which have just recently been outlined for you?
>
> Does any juror have any prejudice or bias for or against any point of view concerning the charges summarized for you from the indictment?
>
> Does any juror know or has any juror or member of his family or any associate had any dealings, either directly or indirectly, with the defendants named in the indictment and presently on trial before you or, for that matter, with any member of their families or friends or associates?
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> . . . . .
>
> Has any past experience of a juror in any way whatsoever caused a juror to doubt his ability to sit as a completely impartial and unbiased trier of the facts? Ladies and gentlemen, I have tried in these questions to direct your attention to possible reasons you might not be able to sit as a fair juror. Let me now ask you quite apart from any prior questions, does any juror have the slightest doubt in his mind for any reason whatsoever that he would be able to serve conscientiously, fairly and impartially in this case and render a true and just verdict according to the law as it will be explained?
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> . . . . .
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> Let me try it a different way. I am sure you can recognize that even if I sat here until eternity caught up with me and if I had the infinite judgment of our diety I could not possibly be secure that I have covered every possible question which would root out and bring to the surface any possible prejudice which is important to a consideration of this case. I am not unaware that ali of us, without exception, are the subject of various conditioning influences that we acquire in life's work and by virtue of experiences which either bruises us or elevates us, but what you are asked to do as jurors is to sublimate any prejudices or any bias which you may have in determining the facts of the case and to accept the law as given you.
>
> So what I am attempting to find out, and essentially this must rely upon your

questions and comments, and specifying the particular ones which applied to her. Nothing in her responses and demeanor indicated that her reasoning abilities or mental processes were deficient. Indeed, her ability to recall my questions applicable to her, conveyed the opposite impression. Likewise, during the three weeks of trial and three days and nights of deliberations, I did not notice anything unusual about her. Nor was anything unusual concerning her brought to my attention by either the attorneys or jurors. (I might add that the attorneys and the jurors were always quick to bring matters to my attention which they thought of moment).

The defendants' second request that the verdict be set aside even without a hearing is utterly without foundation. A showing which is too weak to permit an inquiry into the jury's deliberations is, *a fortiori*, too weak to warrant a new trial. Also, based upon a comparison of the facts of this case with the facts of those cases in which mental incompetency was alleged by movants and rejected by the courts, it is clear that defendants' showing is too weak to justify setting aside the verdict.[32]

Accordingly, defendants' motion is denied.

So ordered.

> honesty, your good faith and your willingness to be candid with the Court, what I want to find out is upon an examination of yourselves, can you say that you can sit fairly and impartially in judgment in this case should you ultimately be chosen to serve?
>
> Do you have any doubt whatsoever about your ability to render a fair and impartial verdict upon the facts in evidence and the law to be applied to those facts?
>
> Soul searching is what is necessary at this point because essentially, really regardless of how you answer any questions, the fact of the matter remains that I must appeal to your honesty and your sense of fairness to reveal to the Court any sense or any feeling which might make it difficult or impossible for you to render a fair and impartial verdict.

Transcript of January 4, 1973, at pp. 10, 21–23.

[32] In all cases in which a juror's incompetency has been alleged as a basis for attacking a verdict, the courts, for differing reasons, have been unanimous in refusing to grant a new trial. Thus, for example, in Iverson v. Prudential Ins. Co. of America, 126 N.J.L. 280, 19 A.2d 214 (1941), within a week after a verdict was rendered, a juror was found to be suffering from a type of insanity "which conjures up an imaginary world and results in a loss of 'contact with reality.'" 19 A.2d at 218. Nevertheless, the trial court refused to grant a new trial because "it was not shown that the juror was so incompetent at trial as not to be able to comprehend 'the nature and quality' of his acts." *Id.* In State v. Welty, 65 Wash. 244, 118 P. 9 (1911), a juror, prior to trial, had been twice adjudged insane and committed to and discharged from an asylum. Five months after trial, the juror was again adjudged insane and committed to an asylum. The trial court denied defendant's motion for a new trial and the Supreme Court of Washington affirmed. In Anderson v. State, 54 Ariz. 387, 96 P.2d 281 (1939), the juror in question was declared incompetent to manage his own affairs "some months" before trial, and remained under the disability throughout the trial. The Supreme Court of Arizona upheld the trial court's rejection of defendant's motion for a new trial, holding that only a declaration of insanity, without the requisite restoration to sanity, would be sufficient to disqualify a juror. Similarly, in Grand Lodge A.O.U.W. of Ark. v. Wood, 113 Ark. 502, 168 S.W. 1070 (1914), the juror in question had been adjudged insane "[s]everal months before the trial" and had been committed to the appropriate state hospital. Although he was released after a "short period" of confinement the juror was never legally restored to sanity. Admitting that the juror was disqualified to serve, the Supreme Court of Arkansas, nevertheless refused to order a new trial. The court reasoned that the disqualification was merely a technical violation of the statute which established qualifications for jurors, and therefore did not warrant a new trial.
See also the cases listed in n. 8, *supra.*

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those terms "vitally affect" the unit employees. Chemical Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971). A balancing of the interests of the employees inside and outside the bargaining unit requires, we believe, that bargaining over the terms of employment of workers outside the unit be likewise limited. Even though in an interdependent economy the wages of one group of workers potentially might affect the wages of all other workers, an employer generally cannot bargain with a union over the wages that the union will negotiate with other employers, see United Mine Workers v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626, (1965),[6] nor can a union bargain with an employer over the wages that the company will negotiate with its other employees absent evidence that the other employees' wages vitally affect the terms of employment of the workers the union represents.[7] As noted above, there is no evidence that the terms of employment at the Vallejo unit affected the New York City unit. Therefore, the Company could not have complied with the arbitrators' award without infringing upon the rights of the Vallejo employees in violation of § 8(a)(1) and (a)(2) of the Act, and the Union's attempt to require it do so constitutes a failure to bargain collectively in violation of § 8(b)(3) of the Act.[8]

Accordingly, the Company's petition is granted, the Board's order is vacated, and the case is remanded for further proceedings consistent with this opinion.

UNITED STATES of America,
Appellee,
v.
John DIOGUARDI and Louis Ostrer,
Defendants-Appellants.
Nos. 113-114, Dockets 73-1759, 73-1769.

United States Court of Appeals,
Second Circuit.

Argued Sept. 13, 1973.

Decided Jan. 4, 1974.

By judgment of the United States District Court for the Southern District of New York, David N. Edelstein, Chief Judge, 361 F.Supp. 954, the defendants were convicted for violations of the federal securities laws, rule 10b-5 of the Securities and Exchange Commission and federal mail fraud statute and for conspiracy, they appealed from the judgments as well as the denial of a motion for new trial for alleged incompetency on part of juror. The Court of Appeals, Lumbard, Circuit Judge, held, inter alia, that the showing made by defendant to whom juror wrote a letter after trial fell short of justifying any further inquiry as to the competence of juror during trial, that trial court's prompt instruction neutralized the effect of prosecutor's comment regarding defendants' failure to produce more witnesses and no prejudicial error resulted from allowing de minimis incorrect testimony to stand.

Affirmed.

Feinberg, Circuit Judge, filed a dissenting opinion.

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[6] The Board has held that an employer may insist upon a "most favored nation" clause in an agreement. Dolly Madison Industries, Inc., 182 N.L.R.B. 1037 (1970).

[7] This is not a situation in which a collective bargaining agreement requires that certain work be done by workers in the unit even though workers outside the unit may be affected. See National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967); Local 24, Teamsters v. Oliver, 362 U.S. 605, 80 S.Ct. 923, 4 L.Ed.2d 987 (1960) (Oliver II). Cf. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964). Here the Union is attempting to set the minimum terms of employment for workers outside the unit.

[8] It is no defense that the arbitrator determined that the New York City agreement applied to the Vallejo unit, because his award was repugnant to the Act. See Pix Manufacturing Co., 181 N.L.R.B. 88 (1970). See generally Ryder Technical Institute, 199 N.L.R.B. No. 85 (1972); Collyer Insulated Wire, 192 N.L.R.B. No. 150 (1971).

1. Criminal Law ⇐923(1)

Only clear evidence of juror's incompetence to understand issues and to deliberate at time of his service requires setting aside a verdict.

2. Criminal Law ⇐956(10)

Only strong evidence that it is likely that a particular juror suffered from incompetence to understand issues and to deliberate at time of service will justify inquiry into whether such incompetence in fact did exist.

3. Criminal Law ⇐956(10)

Juror's letter to defendant about ten days after trial and the essentially uninformed opinions of psychiatrists regarding the letter fell considerably short of justifying any further inquiry into competence of such juror during her service in prosecution for conspiracy and substantive counts relating to violations of federal security laws and regulations and federal mail and wire fraud statutes. 18 U.S.C.A. §§ 371, 1341, 1343; Securities Act of 1933, §§ 17(a), 24, 15 U.S.C.A. §§ 77q(a), 77x.

4. Criminal Law ⇐956(10, 13)

Rule against any inquiry into state of mind of any juror and into conduct of jurors during their deliberation recognizes exceptions only where there is clear and incontrovertible evidence of incompetence shortly before or after jury service, clear evidence of some criminal act, or evidence of some objective fact of internal impropriety. 18 U.S.C.A. §§ 245(b), 1503, 1504; 28 U.S.C.A. § 1867(f).

5. Criminal Law ⇐959

Only when proof of possible juror incompetency during trial has been offered or proof of a closely contemporaneous and independent posttrial adjudication of incompetency do courts conduct hearings to determine whether disability in fact affected juror at time of trial; in absence of such substantial if not wholly conclusive evidence of incompetency courts are unwilling to subject juror to hearing on his mental condition.

6. Criminal Law ⇐730(10)

While it is strictly held impermissible for prosecution to comment on defendant's failure to call witness if only defendant could offer countertestimony or if jury would naturally and necessarily interpret this as a comment on defendant's silence, danger can be neutralized by prompt corrective instructions to jury.

7. Criminal Law ⇐730(10)

Where trial judge gave a prompt and corrective instruction to jury following objected-to remark of government prosecutor to effect that apart from two quasi-character witnesses called by one defendant the defendants had called no witnesses to contradict factual content of government's case, the danger of such remarks being construed as comment on defendants' silence was effectively neutralized and objections properly overruled.

8. Criminal Law ⇐829(10)

Where trial court's charge to jury in prosecution for conspiracy and substantive violations of security laws and of mail and wire fraud statutes was amply cautionary with respect to consideration of accomplice's testimony, no error resulted from refusal to instruct jury specifically that testimony of accomplices who were confessed perjurers or convicted felons was to be scrutinized with particular care. 18 U.S.C.A. §§ 371, 1341, 1343; Securities Act of 1933, §§ 17(a), 24, 15 U.S.C.A. §§ 77q(a), 77x.

9. Criminal Law ⇐1169.1(7)

Incorrect statement of codefendant that defendant, on trial for violation of security laws and mail and wire fraud statutes, used some of the proceeds to help pay off mortgage on his summer home was de minimis, and it was fully within the discretion of trial court to either rule or fail to rule in advance that defense counsel could not introduce evidence of prior acquittal of such defendant on another security fraud charge which involved funds which were actually used to pay off mortgage. 18 U.S.C.

A. §§ 371, 1341, 1343; Securities Act of 1933, §§ 17(a), 24, 15 U.S.C.A. §§ 77q(a), 77x.

10. Criminal Law ⟹984

Each transaction in securities fraud case constituted a separate offense so there was no error in imposing separate consecutive sentences on defendant with respect to count involving confirmation of purchase of particular stock on March 10 and count involving confirmation of similar purchase of more stock on March 11, notwithstanding claim of defendant that the purchases and their confirmations were part of a single transaction. Securities Act of 1933, §§ 17(a), 24, 15 U.S.C.A. §§ 77q(a), 77x.

◆

Harold F. McGuire, Jr., Asst. U. S. Atty., S. D. N. Y. (Paul J. Curran, U. S. Atty., S.D.N.Y., S. Andrew Schaffer and John W. Nields, Jr., Asst. U. S. Attys., S. D. N. Y., on the brief), for appellee.

Gretchen White Oberman, New York City (Jay Goldberg, New York City on the brief), for appellant Dioguardi.

Sheldon H. Elsen, New York City (Orans, Elsen & Polstein, Lewis, Shapiro, Anthony J. Ferrara and Henry J. Boitel, New York City, on the brief), for appellant Ostrer.

Before LUMBARD, FRIENDLY and FEINBERG, Circuit Judges.

LUMBARD, Circuit Judge:

John Dioguardi and Louis Ostrer appeal from judgments of conviction entered on April 12, 1973, after a three-week jury trial held in January 1973 in the Southern District, and from the denial by Chief Judge Edelstein of new trial motions. The forty-count indictment was filed May 27, 1971, against the appellants and seven others.[1] Count one charged the defendants with conspiring, in violation of 18 U.S.C. § 371 to violate provisions of the federal securities laws and regulations, 15 U.S.C. §§ 77q(a), 77x, 78j(b), and 78ff, and Rule 10b-5, 17 CFR 240.10b-5,[2] and the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343. The remaining counts charged substantive violations of these same provisions, except 18 U.S.C. § 1343.

On January 26, 1973, the jury found Ostrer guilty on eleven of the seventeen counts submitted to them by the court, and Dioguardi on four of the nineteen counts submitted as to him.[3] Prior to sentencing, the defendants moved for a new trial or, in the alternative, for an evidentiary hearing. The basis for this motion was an unsolicited letter from one of the jurors to Dioguardi which allegedly established the incompetency of that juror. In reliance on this, and on the provisions of 28 U.S.C. § 1865 (b)(4), they claim that they had been deprived of their right to have their case heard and decided by a panel of twelve competent jurors. Judge Edelstein denied the motion on April 12th. He sentenced Dioguardi to nine years' imprisonment and a $30,000 fine, and Ostrer to three years' imprisonment and a $55,000 fine.[4]

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[1] Of the seven other defendants named in the indictment, three entered guilty pleas (Michael Hellerman, Fred Goodman, and Michael Caricato). Three were tried jointly in a separate trial and were convicted of one or two offenses (Gary Fredericks, Richard Greenberg, and Anthony Soldano), see United States v. Greenberg, 472 F.2d 1404 (2d Cir.), aff'd from the bench, Feb. 16, 1973. The case of the seventh defendant (Morris Winter) was not tried in view of his cooperation with the government and his guilty plea in a related case. Winter, Hellerman, and Goodman testified for the government, as did Steven Schoengold and Bruce Halpern, both named as co-conspirators.

[2] 15 U.S.C. § 77q(a) codifies section 17(a) of the Securities Act of 1933, prohibiting fraud in the sale of securities. Wilful violation of this section is made criminally punishable by section 24 of the Securities Act of 1933, now 15 U.S.C. § 77x. Rule 10b-5 of the Securities and Exchange Commission (17 C.F.R. § 240.10b-5), which prohibits fraud or the use of manipulative devices in both the purchase and sale of securities, was promulgated under 15 U.S.C. § 78j(b), originally section 10(b) of the Securities Exchange Act of 1934. Wilful violation of this rule is made criminally punishable by section 32(a) of the Securities Exchange Act of 1934, now 15 U.S.C. § 78ff.

[3] Both defendants were found guilty on the conspiracy count (18 U.S.C. § 371). Ostrer was found guilty on the following substantive counts:

9—Causing a sale confirmation to be placed in the mail in furtherance of a fraudulent scheme for the sale of stock (15 U.S.C. §§ 77q(a), 77x);

16 through 19—Causing purchase confirmations to be placed in the mail as part of a manipulative device in contravention of Rule 10b-5 (17 C.F.R. § 240.10b-5; 15 U.S.C. §§ 78j(b), 78ff);

31, 33 through 36—Use of the mails as part of a scheme to defraud (18 U.S.C. § 1341).

Dioguardi was found guilty on only three of the substantive counts: 16, 17, and 31.

In addition to their objections relating to alleged juror incompetency, the defendants raise four other claims of error in the conduct of the trial: first, that the government prosecutor's argument in summation, to the effect that neither defendant called witnesses to contradict the government's testimony, was improper comment on each appellant's failure to testify in view of the assertion by each that he alone was in a position to contradict the government's witnesses; secondly, that it was error for the trial court to have refused to charge, as requested, that the testimony of admitted perjurers and felons was to be scrutinized with care and caution; thirdly, that it was improper for the trial court to have ruled that Dioguardi's acquittal of another crime could not be proved when the government intended to utilize the acts underlying the acquittal to show a prior course of illegal conduct; finally, that consecutive sentences for Dioguardi on two of the counts charging securities law violations, counts 16 and 17, were improper since the underlying facts constituted only a single offense.

We find the defendants' arguments unpersuasive and we accordingly affirm the convictions below and let Dioguardi's sentences stand.

I.

The evidence at trial revealed a scheme to manipulate the price of the stock of Belmont Franchising Corporation ("Belmont"), a substantially worthless over-the-counter security. The book value of the stock was almost negligible (Belmont's assets were essentially paper holdings in other concerns); it had been traded for only a short time for at most a few dollars a share.[5]

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[4] The sentences imposed by Judge Edelstein were as follows: in the case of Dioguardi, a prison term of 5 years and a $10,000 fine on count 1, 2 years and $10,000 on count 16 and similarly on count 17, and 5 years and $1000 on count 31; and in the case of Ostrer, 3 years and a $10,000 fine on count 1, 3 years and a $5000 fine on count 9, 2 years and a $10,000 fine on each of counts 16 through 19; 3 years on each of counts 31 and 33 through 35, and 5 years on count 36. Dioguardi's prison terms are consecutive, Ostrer's concurrent. The sentence imposed on Dioguardi on count 31 was suspended, with five years' probation. The sentence imposed on Ostrer on count 36 was also suspended, with one day's probation.

[5] Belmont's initial offering of stock to the public was made in the spring of 1969. In an offering circular dated March 21, 1969, and under the statutory exemption from registration for small issues, Belmont offered 100,000 shares out of an authorized 1,000,000, par value 1¢, at an offering price of $3 a share. The circular stated that the offering was speculative and that the price of the shares bore no relation to the book value of the company. In fact, at the time, Belmont's total assets amounted to roughly $10,000 and its liabilities to roughly $7000.

By October 20, 1969, according to the 2A form filed by Belmont with the Securities and Exchange Commission on that date, only 870 shares of the offering had been sold, with 99,130 unsold shares remaining.

On January 2, 1970, in exchange for a total of 195,000 restricted shares of Belmont stock, Belmont acquired 100% holdings in three other concerns: Top Secret International Programming, Slimerama International Corp., and Wonderful World of Grooming. Prior sales of these newly-acquired companies amounted to merely a few thousands of dollars, and net profits for each were about $1000. Nonetheless they listed total assets slightly in excess of $1,000,000. Top Secret International Programming listed a "computer program" valued at $500,000, and the other two enterprises each listed "formula rights" valued at $250,000. These assets were reflected in supplementary notes in

In January of 1970 Michael Hellerman, who pleaded guilty and testified for the government, began steps to drive up the price of Belmont stock, first to $5 or $6 a share and then to nearly $50 a share. At that time two stock manipulators, Anthony Soldano and Fred Goodman, in concert with Hellerman, commenced acquiring substantially all of the 28,720 known publicly tradeable shares of Belmont. Goodman and Soldano executed their purchases ostensibly through the open market, using brokers who quoted prices for Belmont through the National Quotation Bureau's pink sheets for over-the-counter securities. These purchases created the appearance of an active public market in the stock.

By early March, 1970 Goodman and Soldano had caused the market price of Belmont as quoted in the pink sheets to reach $15 a share. They did this primarily through directions to their brokers, who traded small quantities of the stock among themselves. In the meantime, Goodman and Soldano had acquired control, they believed, of all the outstanding stock.

At this point Hellerman's role became paramount. According to his testimony, he already had an understanding with Dioguardi that "whatever I did in the future, . . . he would have 25 per cent." It had also been agreed between Hellerman, on one side, and Goodman and Soldano on the other that once the price of Belmont stock reached $15, Hellerman and his associates would purchase all the stock at the $15 level, with a $5 per share kickback, prior to further manipulation upwards. In confirming this arrangement with Goodman and Soldano, Hellerman took Soldano to Dioguardi's office "to make sure it was on the record."

According to Hellerman, it was at this time in early March that he brought Ostrer into the scheme, although the two were only recently acquainted. Ostrer agreed to commit himself to buy 14,000 shares of Belmont at $15 a share ($210,000 total), with the understanding that he would split any future profits with Hellerman, that Hellerman would guarantee him against loss, and that a loan of the purchase money would be arranged so that he would not have to "lay out a quarter" of the $210,000. Purchase orders in Ostrer's name or in his behalf were to be made through various New York Stock Exchange firms.

Ostrer then placed orders in his own name and in his sister's for 14,000 shares of Belmont. However, most Exchange firms which he approached refused to accept his orders, and he was forced to place relatively large block orders through firms where brokers were already in league with Hellerman.[6]

Contemporaneously, Hellerman made arrangements with others to purchase the remaining 14,000 or so shares of Belmont. These individuals were able to pay the selling brokers (at the $15 a share price), but Ostrer was unable to raise the $210,000 needed to "hold up" his end of the deal, a circumstance which left his brokers unpaid. According to Hellerman, he thereupon obtained a loan for Ostrer through Dioguardi. The funds, totalling $60,000, came from Hickey DiLorenzo, at an interest rate of 1½% a week. DiLorenzo also demanded and received $24,000 from Hellerman

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Belmont's financial statements for the end of 1969, but the underlying statements of the three subsidiaries, conveniently acquired after the start of the year, were unaudited.

Belmont's second 2A statement, filed with the SEC in April, 1970, indicated that 28,720 shares of the March 21, 1969, offering had been sold, and that no more of the original 100,000 shares were still being offered.

[6] Among these orders were ones through Bruce & Co. on March 10, 1970, for 2000 shares, and through Kelsey & Co. on March 11, 1970, for 3500 shares. Co-conspirator Bruce Halpern, see fn. 1 *supra*) was a principal of Bruce & Co. Co-conspirator Schoengold was a vice president of Kelsey & Co., and Hellerman was an undisclosed owner of Kelsey.

These particular purchases on March 10th and 11th are relevant to defendant Dioguardi's challenge (discussed further below) to alleged pyramiding of offenses.

for this favor (part of the kickback profits already made). In addition, Hellerman also advanced Ostrer $52,500, and Ostrer obtained the balance he needed from other sources.

Thereafter, from the end of March through late April, 1970, Hellerman directed purchases and sales of Belmont stock at ever-increasing prices among the individuals and brokers whom he controlled. He kept Dioguardi, Ostrer, and DiLorenzo informed as the price rose. He also arrranged for Ostrer to sell off enough stock, through a nominee, to repay the $60,000 loan from DiLorenzo—with a $1700 profit left over which he split with Ostrer. By the end of April he had received approximately $140,000 in kickbacks from Goodman and Soldano. He gave $30,000 to Dioguardi, and invested $9,000 more in a business in which Dioguardi had an interest.

In early May, 1970, the scheme failed. The president of Belmont through a broker unknown to the manipulators, began to sell heavily his own "investment" stock in the corporation. The market was unable to absorb the sales, and Hellerman was unwilling to buy the stock and could not find other purchasers. Consequently the market for Belmont collapsed, leaving Ostrer (among others) with large quantities of unsold stock. Ostrer then tried to hold Hellerman responsible for his losses. Hellerman became worried because DiLorenzo took Ostrer's side. Dioguardi subsequently arbitrated the dispute to some extent, and arranged for partial compensation to Ostrer to the sum of $25,000.

At trial Dioguardi called no witnesses and based his defense primarily on cross-examination going to the lack of credibility of the government's major witnesses, who were all accomplices. Ostrer did not testify but he did call two witnesses whose testimony indicated that Ostrer had been a "victim" of Hellerman's machinations.

About ten days after trial, Dioguardi received a letter from one of the jurors, Miss Genena Rush, a nurse's aide employed at Flower Fifth Avenue Hospital in New York City. The letter was written on stationery bearing the zodiac sign of Libra, and on one page the legend that it was "the heavenly house under which I was born." The juror wrote of her clairvoyant powers which enabled her to see that Dioguardi was basically a good person. She stated her belief that he was guilty, "Your mistake your guilty," and questioned him about Hellerman, "Why you let such a relationship exist between you and a man like Hellerman?," and called upon him to repent, "One word appear before me *repent.* If you repent and run a clean business it is the good within you that will save you, and you will gain what you have lost." Miss Rush stated that

> I have eyes and ears that I can see things before it happen. I can tell you about other and what they are thinking and doing.

and that her eyes

> are only partly open . . . . Unfortunate, a curse was put upon them some years ago. I have some people working on them.

The letter is reproduced in full in the margin.[7]

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[7] Miss Rush's letter reads as follows:

521 W 152 Street,
New York, N.Y. 10031
February 8th—1973

Dear Mr. Dioguardi,

Under the situation and such circumstance I hope that I have made the right decision. I talk to my friends Bertha and her husband Olive about this, Olive agree that I write to you. Bertha, however, was against it. Nevertheless, I felt I had to write you. I cannot omit what I have seen. When I say the good within you and how hard your wife was trying; I prayed about it. One word appear before me *repent.* If you repent and run a clean business it is the good within you that will save you, and you will gain what you have lost. Before I continue I must explain something to you. I have eyes and ears that I can see things before it happen. I can tell you about other and what they

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Dioguardi's attorneys sent copies of the letter to seven psychiatrists, all of whom responded (one in an affidavit) to the effect that, in their opinion, what Miss Rush had written indicated hallucinatory tendencies, symptoms of possible psychosis, paranoia, and grandiosity, and in general an inability to appreciate reality without fantasizing.[8] The psychiatrists also pointed out that further psychiatric analysis was needed before a diagnosis could be ventured with any certainty, or before it could be said that Miss Rush's infirmities, whatever their nature and extent, might have rendered her unable to comprehend the proceedings at trial.[9] The psychiatrists were given no information about the

are thinking and doing. If I am wrong about this it is the first time.

I would like to visit you. I would like to talk to you about what appear before me. I would like to do so when my eyes fully open. They are only partly open. I don't know at the present when they will open. Unfortunate, a curse was put upon them some years ago. I have some people working on them. Everything is being done that can be done. So we will have to wait. As I stated I cannot omit what appear before me, when I was on the jury bench. You feel that this is the end for you. However, it is not. Something appear before me that I must do. It is the good within you that I must use and within that good, you will gain what you have lost. If, however, I am wrong it is the first time.

Why, you let such a relationship exist between you and a man like Hellerman? When I think of the good that I saw within you it does not add up. Where did Hellerman get those fur coats? Does he have any for sail? Omit the question. I really can't afford one, and if I could I probably be afraid to wear it.

Why persecute your wife? Your mistake your guilty then take it out on her. The ordeal you put her through I wonder how she survive through it. One word appear before me brave. She is a brave girl. She love you. She never stop loving you not a single moment. Tell her to please be careful. From what I can see she is still in business. I suggest it is not wise at this time. I believe she is being watch.

That was a good lawyer you had. I entain to send him some custom as soon as my eyes open.

Tell Ostrer I am praying for him.

Mr. Dioguardi, I want to ask a favor of you please.

I want you to look upon me as a woman and I look upon you as a man and not white man and black woman. Olive agree with me.

Let's leave color out, *OK*.

I was told you will only have to serve one third of the time given. So relax this is not the end. Soon you will be free.

When I call the Federal information center and the record room yesterday they all know you. They all seem to have it in for you. Its se[illegible] deep within them like a personal matte[illegible]

Sincerely,

Genena

The letter sheets were printed with the word "LIBRA" and a picture of a woman with scales. On the last page of the letter, under the picture, Miss Rush wrote, "The sign Libra is the heavenly house of the zodiac under which I was born." The letter was addressed to "Mr. John Dioguardi, Federal Correction Institution, Dan Bury, Conn. 06813."

[8] The copy of the letter which Dioguardi's attorneys used at first was not the original from Juror Rush. Rather it was a handwritten copy which Dioguardi had made of the original and which he had forwarded to them. Somewhere in transcribing the word "omit" was changed to "admit" in the fifth sentence of the first paragraph and also in the ninth sentence of the second paragraph. Thus "I cannot omit what I have seen . . ." became "I cannot admit what I have seen . . ." and, similarly, "I cannot omit what appear before me . . ." became "I cannot admit what appear before me. . . ." Six of the seven psychiatrists (all except Dr. Portnow) received their copy of the letter in this incorrect form. These errors may have influenced their reading and subsequent analysis of the letter, but we do not think significantly. The defendants' contentions concerning the competency of Miss Rush rest as much on the letter taken as a whole as on any particular sentences. While not belittling its importance, we do not think that reliance on the incorrect word "admit" was, as the government contended, "the cornerstone of [the] various psychiatric opinions."

[9] The supporting letters of the psychiatrists and the affidavit of Dr. Portnow need not be set out at length. Samples of their conclusions are as follows:

1.) Dr. Stanley L. Portnow (affidavit of April 2, 1973):

[T]he letter makes a positive presumptive showing that . . . the juror suffered from a chronic psychotic thought disorder

Note 9—Continued

which so severed her relationship with reality that she was unable to exercise critical judgment or to function in an unbiased manner in the evaluation of evidence produced at the trial. Indeed, it would appear that her unsoundness of mind was so overwhelming that she was subject to auditory and visual hallucinations, delusions and a belief in her own omnipotence.

The exact nature of the type of psychosis which the juror is afflicted, can be further investigated. . . . Such an investigation would entail clinical psychiatric interviews and, of particular importance, psychological testing. . . .

2.) Dr. Samuel C. Karlan (letter of March 15, 1973):

It is clear from this letter that this patient is having imaginations about what she can see and what she can do and these are in the form of visual hallucinations and apparently auditory hallucinations. It is also clear from this letter that she had these visions while she was on the jury.

It is therefore my opinion that the letter is evidence that this patient underwent a psychotic episode while she was on the jury and while she wrote this letter, which is suggestive of a schizophrenic mechanism and that she was not in contact with reality.

3.) Dr. Robert W. Damino (letter of March 15, 1973):

The content of the letter written by Gemena *(sic)* Rush indicate that she is substantially disturbed in reality relationships . . . that she was having visual hallucinations . . . [and] that this woman was making an identification with the accused. . . .

[A]t the time she served on the jury she was utterly incapable of thinking logically as to the evidence, and utterly incapable of properly evaluating the evidence.

4.) Dr. Jerry C. Atkins (letter of March 16, 1973):

My impression is judging from this letter Miss Rush would have had great difficulty exercising sound judgment during the trial mentioned in her letter. Her religious convictions could be classified as being ideas of grandiosity and furthermore there is evidence of auditory and visual hallucinations *(sic)* in her description of herself.

5.) Dr. John J. Vetter (letter of March 15, 1973):

[T]here is clear cut evidence of mental disorder. . . . The abnormal thinking processes, impairment of judgment, hallucinatory experience and delusional belief directly involving the case at hand, would indicate an incapacity, by reason of mental infirmity, to render efficient jury service, or to have functioned efficiently as a juror in the case concerned. 6.) Dr. Arnold H. Zucker (letter of March 5, 1973):

The writer is emotionally involved with Mr. Dioguardi, in an intensive manner.

The writer is concerned with Mr. Dioguardi's welfare and fate.

The writer wishes to be helpful and supportive.

The writer believes she possesses powers of clairvoyance and feels impelled to act upon her revelations.

The writer experiences guilt about Mr. Dioguardi's incarceration. She is convinced about his "bad" behavior (wrongdoing, association with "a man like Hellerman") but "sees" the "good" in him. Her responses are somewhat appropriate in the context of her educational, cultural, and religious background. To alleviate her guilt feelings and "save" Mr. Dioguardi, she urges him to "repent", mend his ways, and maintain his faith. . . .

I believe that the data suggests the following psychodiagnostic impressions, which require clinical confirmation (psychiatric evaluation of the writer).

1. Above the cultural-religious beliefs, *autistic* (pathological fantasy preoccupation) *trends* are indicated. . . .

2. *Paranoid trends* are significant. . . .

. . . .

[M]y psychiatric impression is that of a highly paranoid, autistically preoccupied (probably psychotic) individual, who has maintained fairly adequate external controls and functioning, but who may be decompensating due to the strong emotions produced by her role in the trial.

7.) Dr. Donald M. Brough (letter of February 28, 1973):

[T]his letter was written consciously with every good intention on the part of Mrs. *(sic)* Rush in an effort to be helpful to Mr. Dioguardi. However, . . . the writer was here showing evidence of being hallucinated, delusional and would prove to be suffering from a Paranoid Condition.

Taking it in a far less literal fashion allowing the greatest degree of latitude in interpreting what she wrote, so that it can be taken as a somewhat picturesque, idiosyncratic expression of her ideas, influenced by educational, cultural and religious factors, I still would find important grounds for believing that the letter shows that she was involved in this situation in a very unreal and unusual way.

In my opinion it is most likely that she is, in fact, suffering from a Paranoid Condition in which she has hallucinatory experiences and delusional thinking.

juror or about the trial and the issues, and the court had forbidden anyone to seek to interview her.

On the basis of Miss Rush's letter and the opinions of the psychiatrists, Dioguardi and Ostrer moved pursuant to Rule 33, F.R.Crim.P., for a new trial or in the alternative, for an evidentiary hearing on the competency of Miss Rush as a juror. They asserted that an uncontroverted showing of incompetency had been made out, in violation of 28 U.S.C. § 1865(b)(4) and their constitutional rights.[10]

Judge Edelstein, after hearing oral arguments and receiving briefs, denied the motion for a new trial and for further investigation of the juror's competency on April 12, 1973, and later filed a thorough and considered opinion on July 18, 1973. 361 F.Supp. 954. He stated:

> Moreover, there was nothing in the demeanor of the juror during *voir dire*, trial or deliberations to indicate that she was anything but competent to serve on the jury. On *voir dire*, the jurors were asked group questions in an effort to elicit from them their feelings of bias or prejudice which would prevent them from rendering a fair and impartial verdict. [footnote omitted] In direct colloquy with me, the juror answered directly and responsively, stating that she understood my questions and comments, and specifying the particular one which applied to her. Nothing in her responses and demeanor indicated that her reasoning abilities or mental processes were deficient. Indeed, her ability to recall my questions applicable to her, conveyed the opposite impression. Likewise, during the three weeks of trial and three days and nights of deliberations, I did not notice anything unusual about her. Nor was anything unusual concerning her brought to my attention by either the attorneys or jurors.

Examination of the juror on the voir dire had disclosed that she was then employed by Flower Fifth Avenue Hospital as a patient attendant assisting the nurses and had been so employed for four years. In answer to the court's question as to whether any questions or comments applied to her, she stated that in 1944 she was employed by the Navy Department in Cleveland as assistant to the foreman in the cleaning department. Prior to her current hospital employment she was a silk finisher in a cleaning shop in the Bronx.

II.

A—Competency of Juror Rush

[1-3] It is well settled that only clear evidence of a juror's incompetence to understand the issues and to deliberate at the time of his service requires setting aside a verdict. And only strong evidence that it is likely that the juror suffered from such incompetence during jury service will justify an inquiry into whether such incompetence in fact did exist. In our view the juror's letter, and the essentially horseback uninformed opinions of the psychiatrists regarding the letter, fall considerably

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Note 9—Continued

> Whatever the court may consider the proper steps to take in regard to any other aspect of the case, it would be my hope that further psychiatric examination would be gently encouraged upon her, and that she would be willing to cooperate.

[10] 28 U.S.C. § 1865, which is part of the Jury Selection and Service Act of 1968, P.L. 90-274, 82 Stat. 53, provides in relevant part as follows:

> (b) In making such determination [whether a juror is qualified to serve] the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries . . . unless he . . .
>
> (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service. . . .

The Act provides no guidelines, however, for what procedures are to be followed where there is, after trial, discovery of possible grounds for juror disqualification. However, see fn. 12, below. See also ABA Standards Relating to Trial by Jury, Parts II, V, and Commentary (Approved Draft 1968).

short of justifying any further inquiry. Furthermore, the appellants have not cited a single authority which supports a grant of their motion on this record. Judge Edelstein was entirely correct in denying the motion.

[4] Reluctance to inquire into the state of mind of any juror and into the conduct of the jurors during their deliberations rests on sound reasons.[11] The rule against any inquiry whatever recognizes exceptions only where there is clear and incontrovertible evidence of incompetence shortly before or after jury service, clear evidence of some criminal act, or evidence of some "objective fact" of internal impropriety.[12] Even in the case of recent incompetence a hearing will be had to establish that it must have existed during jury service.

The strong policy against any post-verdict inquiry into a juror's state of mind was stated by this court regarding an analogous situation in United States v. Crosby, 294 F.2d 928, 950 (2d Cir. 1961), cert. denied sub nom. Mittelman v. United States, 368 U.S. 984, 82 S.Ct. 599, 7 L.Ed.2d 523 (1962):

There are many cogent reasons militating against post-verdict inquiry

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[11] See 8 Wigmore, Evidence §§ 2349, 2352–2354 (McNaughton rev., 1961). As the Supreme Court said in Stein v. New York, 346 U.S. 156, 178, 73 S.Ct. 1077, 1089, 97 L.Ed. 1522 (1953):

> Nor have the courts favored any public or private post-trial inquisition of jurors as to how they reasoned, lest it operate to intimidate, beset and harass them. This Court will not accept their own disclosure of forbidden quotient verdicts in damage cases. McDonald v. Pless, 238 U.S. 264, [35 S.Ct. 783, 59 L.Ed. 1300]. Nor of compromise in a criminal case whereby some jurors exchanged their convictions on one issue in return for concession by other jurors on another issue. Hyde v. United States, 225 U.S. 347, [32 S.Ct. 793, 56 L.Ed. 1114]. "If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference." McDonald v. Pless, [238 U.S. 264 (1915)] at pages 267–268 [35 S.Ct. at page 784].

[12] See 18 U.S.C. §§ 245(b), 1503 1504. See also 28 U.S.C. § 1867(f). Such exceptions as these which the law has condoned to the privacy and sanctity of the jury reflect the need to preserve its impartiality. The quickness with which jury findings will be set aside when there is proof of tampering or *external* influence, and the severe penalties imposed on those who attempt such interference, parallel the reluctance of courts to inquire into jury deliberations when a verdict is valid on its face. See Mattox v. United States, 146 U.S. 140, 149–150, 13 S.Ct. 50, 36 L.Ed. 917 (1892). Such exceptions support rather than undermine the rationale of the rule that possible *internal* abnormalities in a jury will not be inquired into except "in the gravest and most important cases." McDonald v. Pless, 238 U.S. 264, 269, 35 S.Ct. 783, 785, 59 L.Ed. 1300 (1915).

These considerations explain the one exception to the rule against a jury impeaching its own verdict allowed in those instances when the evidence offered of internal impropriety concerns "objective facts." This "distinction between what may and what may not be established by the testimony of jurors to set aside a verdict" has been recognized by the Supreme Court. See Mattox v. United States, *supra*, 146 U.S. at 148–149, 13 S.Ct. 50. However, courts have invoked the exception and permitted inquiry into a jury's deliberation only when there has been a strong showing of "objective" impropriety, such as blood relation between juror and defendant or extraneous material brought to the jury's attention during deliberations. As the Supreme Court said in United States v. Reid, 53 U.S. 361, 366, 13 L.Ed. 1023 (1851), "[C]ases might arise in which it would be impossible to refuse [evidence of impropriety] without violating the plainest principles of justice." But "[u]nquestionably such evidence ought always to be received with great caution." Nor has the Court seen fit since then to relax its position, McDonald v. Pless, *supra*, 238 U.S. at 269, 35 S.Ct. 783. See Rotondo v. Isthmian Steamship Co., 243 F.2d 581, 583 (2d Cir. 1957); United States v. Crosby, 294 F.2d 928, 949 950 (2d Cir. 1961), cert. den. sub nom. Mittelman v. United States, 368 U.S. 984, 82 S.Ct. 599, 7 L.Ed.2d 523 (1962); 8 Wigmore, Evidence § 2349 (McNaughton rev., 1961). See also ABA Standards Relating to Trial by Jury, Sec. 5.7; United States ex rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970), cert. denied, 402 U.S. 906, 91 S.Ct. 1373, 28 L.Ed.2d 646 (1971); and Judge Friendly's discussion in Miller v. United States, 403 F.2d 77 (2d Cir. 1968), fn. 11, at 83 84.

> into jurors' motives for decision. The jurors themselves ought not be subjected to harassment; the courts ought not be burdened with large numbers of applications mostly without real merit; the chances and temptations for tampering ought not be increased; verdicts ought not be made so uncertain.

We cited this language in Miller v. United States, 403 F.2d 77 (2d Cir. 1968) where the court also emphasized, at page 82, the importance of the dangers presented by inquiries that go beyond objective facts: "inhibition of jury-room deliberations, harassment of jurors, and increased incidence of jury tampering." See also Stein v. New York, 346 U.S. 156, 178, 73 S.Ct. 1077, 97 L.Ed. 1522 (1953); McDonald v. Pless, 238 U.S. 264, 268, 35 S.Ct. 783, 59 L.Ed. 1300 (1915); and Mattox v. United States, 146 U.S. 140, 147–151, 13 S.Ct. 50, 36 L.Ed. 917 (1892).

[5] With respect to post-verdict evidence of possible juror incompetency during the trial, courts have refused to set aside a verdict, or even to make further inquiry, unless there be proof of an adjudication of insanity or mental incompetence closely in advance of the time of jury service.[13] Only when proof of this nature has been offered, or proof of a closely contemporaneous and independent posttrial adjudication of incompetency,[14] have courts conducted hearings to determine whether the disability in fact affected the juror at the time of trial.

But absent such substantial if not wholly conclusive evidence of incompetency, courts have been unwilling to subject a juror to a hearing on his mental condition merely on the allegations and opinions of a losing party. In Peterman v. Indian Motorcycle Co., 216 F.2d 289 (1st Cir. 1954), the plaintiff, shortly after judgment against him in a civil suit for personal injury, moved for a new trial on the grounds "that certain information, discovered since the trial, disclosed the mental unfitness of the foreman of the jury, whose condition, if it had been known . . . would have been a ground for disqualification." Judge Wyzanski heard counsel on the motion and requested an offer of proof from the plaintiff's attorney.

> The offer of proof was . . . that the juror in question, because of his mental disturbance, has been receiving disability compensation from the Veterans Bureau; that he has difficulty in sleeping and concentrating; that his memory is not good; that he has had depressed periods during which he entertained the idea of suicide; that he has had to undergo treatment for anxiety reaction to a psychic episode expressed by auditory hallucinations; that he has been under the care of a psychiatrist for an extended period, with little prospect of an early overcoming of his difficulties. [*Id.*, at 292.]

Judge Wyzanski held that the offer of proof was inadequate and denied the plaintiff's motion.[15] The Court of Ap peals for the First Circuit agreed, stating that:

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[13] See Anderson v. State, 54 Ariz. 387, 96 P.2d 281 (1939); Grand Lodge A.O.U.W. of Ark. v. Wood, 113 Ark. 502, 168 S.W. 1070 (1914); Austin v. People, 106 Colo. 506, 107 P.2d 798 (1940); Brown v. State, 219 Ark. 647, 243 S.W.2d 938 (1951); Ex parte Lovelady, 152 Tex.Cr.R. 93, 207 S.W.2d 396 (Tex.Cr.App.1947), cert. granted, 333 U.S. 867, 68 S.Ct. 787, 92 L.Ed. 787, cert. dism., 333 U.S. 879, 68 S.Ct. 914, 92 L.Ed. 1154 (1948); Durham v. State, 182 Tenn. 577, 188 S.W.2d 555 (1945); State v. Buey, 104 Mont. 416, 66 P.2d 1049 (1937); Eastman Kodak Stores, Inc. v. Summers, Mo.App., 377 S.W.2d 476 (Kan.C.C.A.1964).

[14] See Jordan v. Massachusetts, 225 U.S. 167, 32 S.Ct. 651, 56 L.Ed. 1038 (1912), aff'g Commonwealth v. Jordan, 207 Mass. 259, 93 N.E. 809 (1911); State v. Camp, 110 W.Va. 444, 158 S.E. 664 (1931); Barik v. Dundee Woolen Co., 66 N.J.L. 420, 49 A. 442 (1901); Iverson v. Prudential Ins. Co. of Amer., 126 N.J.L. 280, 19 A.2d 214 (1941); State v. Welty, 65 Wash. 244, 118 P. 9 (1911).

[15] It is not clear to what extent Judge Wyzanski treated the plaintiff's motion for a new trial in *Peterman* as also being a motion for conducting a hearing into the juror's competency. But evidently no hearing was thought required and none was held.

> Considering the strong policy against the too-ready impeachment of jury verdicts on the basis of such afterthoughts suggested by a disappointed litigant, . . . the trial judge cannot be held to have abused his discretion in declining to grant a new trial on this ground. [*Id.*]

See also United States ex rel. Daverse v. Hohn, 198 F.2d 934 (3rd Cir. 1952).

In light of this legal background, we do not believe appellants made enough of a case to justify further inquiry into the competence of Juror Rush. No evidence was offered of any history of mental instability on the part of Miss Rush, much less evidence of any adjudication of insanity or incompetence. Indeed, what we do know of her past, although it is little, reflects quite the contrary situation. She has held steady employment over the past four years as a nurse's aide at Flower Fifth Avenue Hospital, and apparently had steady employment before that as well. The trial judge, as noted above, found the juror alert and responsive and he noted nothing unusual about her during the three weeks of trial and three days and nights of deliberation. Although the opinions of experts are not to be dismissed altogether, they were here of necessity formed in a vacuum, based on one piece of evidence, and fall far short of constituting the sort of "objective fact" which can justify inquiry into the internal workings of the jury. The fact that there is no evidence of harassment of Miss Rush or solicitation of the letter does not render irrelevant the policy considerations which forbid inquiry into the internal workings of the jury absent objective evidence of impropriety. In another case a letter could be fabricated or solicitation could be disguised; a decision for appellants on this issue would therefore raise very real risks of "inhibition of jury room deliberations, harassment of jurors, and increased incidence of jury tampering." Indeed, even where such a letter is as fully voluntary as the one in this case appears to be, it surely was not thought by its author to be an invitation to "develop evidence by investigating the juror's background or by persuading her to undergo a voluntary mental examination"—the suggestions of the dissent for possible proceedings on remand. We conclude that the action of the district court in denying the defendants' motion was entirely proper.

B—Prosecutor's Comments in Summation

The government prosecutor, in his summation, noted that, apart from the two quasi-character witnesses called by defendant Ostrer, the defendants had called no witnesses to contradict the factual content of the government's case. Defense counsel objected to these remarks, and the appellants argue that the remarks were improper in that only they themselves (or co-conspirators whose testimony they could not compel) could have testified in contradiction to the government's witnesses. We do not agree.

[6] It is true that it has been frequently held impermissible for the prosecution to comment on a defendant's failure to call witnesses where only the defendant could offer countertestimony or where the jury will "naturally and necessarily" interpret this as a comment upon the defendant's silence, otherwise constitutionally protected. See, e. g., United States v. Lipton, 467 F.2d 1161 (2d Cir. 1972); United States v. Flannery, 451 F.2d 880 (1st Cir. 1971); United States v. Handman, 447 F.2d 853 (7th Cir. 1971); Desmond v. United States, 345 F.2d 225 (1st Cir. 1965).

[7] However, this danger can be neutralized by a prompt corrective instruction to the jury. Such an instruction was given by Judge Edelstein. Moreover, this was not the close situation in which it was a question of a defendant's word against the word of one other (cf. *Handman*, where the defendant was implicated solely by an inform-

er's testimony about a telephone conversation between himself and the defendant). Thus, even though many of the meetings between Hellerman, Ostrer, Dioguardi, and DiLorenzo were private, their activities also involved numerous stock brokers and other Wall Street figures, several of whom also testified at trial. See fn. 1, *supra*. Given the breadth of the operation, it was not improper for mention to have been made of the dearth of defense witnesses from so large a cast of characters. The record supports the conclusion that there were meetings between the persons involved in the Belmont stock manipulation at which more were present than the defendants and the government's witnesses at trial, and that some of these persons could have been called to testify or at least that in many other ways defendants could have waged factual war with the detailed evidence of the government's witnesses.

In United States ex rel. Leak v. Follette, 418 F.2d 1266 (2d Cir. 1969), cert. denied, 397 U.S. 1050, 90 S.Ct. 1388, 25 L.Ed.2d 665 (1970) which concerned similar comments by the prosecutor on the strength of the government's case against the accused and on the lack of any contradictory evidence, we reviewed the many precedents which, in almost every instance, have "held that remarks concerning lack of contradiction are forbidden only in the exceedingly rare case where the defendant alone could possibly contradict the government's testimony," *id.*, at 1269, and then concluded that

> where the prosecutor confines himself to arguing the strength of his case by stressing the credibility and lack of contradiction of his witnesses, we will not be astute to find in this a veiled comment on the defendant's failure to testify even if in practical fact, although not in theory, no one else could controvert them. [Id., at 1270.]

The defendants' objections to the prosecutor's comments in summation were properly denied.

C—Specific Charge on Accomplice Testimony

[8] Both defendants argue that it was error for the trial court to have refused to instruct the jury specifically that the testimony of accomplices who were confessed perjurers or convicted felons was to be scrutinized with particular care. There is no merit to this argument. The trial court's charge to the jury was amply cautionary on this point. A similar charge was recently sustained by us in United States v. Projansky, 465 F.2d 123, 136–137 and nn. 24–25 (2d Cir.), cert. denied, 409 U.S. 1006, 93 S. Ct. 432, 34 L.Ed.2d 299 (1972).

D—The Evidentiary Ruling

[9] At one point in the trial Hellerman testified that Dioguardi had used some of the proceeds of the Belmont stock scheme to help pay off a mortgage on his summer home. Apparently this statement was incorrect. To help pay off the mortgage Dioguardi had used funds obtained through a prior stock manipulation, but one on which he had been acquitted at a previous trial. At the side bar, counsel for Dioguardi argued that the prosecution should correct Hellerman's testimony. The trial court stated that correction was properly the responsibility of defense counsel. Dioguardi's lawyer, however, was unwilling to raise the issue unless proof could also be introduced of the earlier acquittal. The trial judge at this point expressed himself somewhat ambiguously, and the parties differ whether we should read him as having refused to give a ruling in advance on the question whether he would allow proof of acquittal, holding that admissibility would depend on the course of testimony, or as having held that proof of acquittal would not in any case be admissible in this context. In either event, as a consequence of the trial judge's action, Hellerman's testimony was allowed to stand, and the issue was not raised again.

Dioguardi claims that the court's ruling or failure to rule was improper and that it permitted false testimony to reach the jury. This claim, while perhaps technically valid, is essentially groundless. The circumstances behind the controversy at issue were never pursued in testimony in open court. No facts behind it were ever in evidence. While the record does reveal occasional allusions to the prior stock manipulation, the so-called "Imperial deal," none of these could be considered prejudicial in reference to Dioguardi. Hellerman's statement was *de minimis* in view of the other evidence. No reversible error was committed by the trial court under the circumstances. It was a matter fully within the trial court's discretion. See United States v. Kahn, 472 F.2d 272, 282 (2d Cir.), cert. denied, 411 U.S. 982, 93 S.Ct. 2270, 36 L.Ed.2d 958 (1973).

E—Consecutive Sentences for Stock Fraud

[10] Lastly, Dioguardi claims that it was improper for the trial court to impose separate consecutive sentences and separate fines upon him for the violations in counts 16 and 17 of the indictment. Count 16 involved confirmation of the purchase in Ostrer's name, with Dioguardi's approval, of 2000 shares of Belmont stock through Bruce & Co. on March 10, 1970. Count 17 involved confirmation of the similar purchase of 3500 shares through Kelsey & Co. on March 11th. See fn. 6, *supra*. Diorguardi argues that these purchases, and their confirmations, were part of a single transaction, namely Ostrer's purchasing half (14,000) of the supposed outstanding shares of Belmont stock, and that hence they cannot constitute separate violations of the securities laws.

It is true that there has been debate in the past over whether such transactions constitute a multiple offense, the essence of the violation being illegal use of the mails, or a single offense, the essence being fraud. See 3 Loss, Securities Regulation 1521 (2d ed., 1961); and also United States v. Hughes, 195 F. Supp. 795 (S.D.N.Y.1961). However, recent litigation involving fraud under the securities laws has resolved this debate in favor of the position that each transaction in a securities fraud case constitutes a separate offense. Sanders v. United States, 415 F.2d 621 (5th Cir. 1969), cert. denied, 397 U.S. 976, 90 S. Ct. 1096, 25 L.Ed.2d 271 1970); see also United States v. Binstock, 37 F.R.D. 13 (S.D.N.Y.1965). This position acknowledges the fact that activity such as the kind Dioguardi engaged in here in relation to the two Ostrer purchases on March 10th and 11th was fraudulent in each instance, not necessarily in respect to the scheme as a whole, nor even necessarily in respect to the sellers on those two days (who may have been coconspirators or perhaps simply others pleased to sell at a gain), but in respect to the investing public. Thus although a situation can be envisioned in which consecutive sentences on multiple fraud convictions would be questionable, *cf.* United States v. Brown, 36 F.R.D. 207 (D.D.C.1964), in the instant case the determination and sequence of the sentences imposed on defendant Dioguardi were matters within the discretion of the trial court. See Sanders v. United States, *supra*, 415 F.2d at 626, and the cases there cited. The consecutive sentences on counts 16 and 17 were therefore proper.

Judgments of conviction affirmed.

FEINBERG, Circuit Judge (dissenting):

The majority opinion holds that an unsolicited, bizarre letter from a juror, who claims to be able to "see things before it happen" and to know what other people "are thinking," does not justify further inquiry into the juror's competence, even though seven psychiatrists preliminarily diagnose her as mentally ill. From this holding, I emphatically dissent.

There is no need to rehearse in great detail the basic principles of law that govern the issue before us. As the majority points out, after a trial is over, there is a great judicial "[r]eluctance to inquire into the state of mind of any juror[s] . . . during their deliberations," and that reluctance rests upon "sound reasons." But reluctance to inquire is not the same as obdurate refusal to face facts, especially such "objective" facts as a rambling, unsolicited letter, sent 13 days after verdict, that strongly suggests severe mental illness. A close look at that letter and the comments upon it of the seven doctors, whose six letters and one affidavit were submitted to the district judge is instructive.

The letter from juror Rush was written on stationery which bears the Zodiac sign "Libra" at the top over a picture of a woman holding scales. It stated as follows:

> February 8th—1973
>
> Dear Mr. Dioguardi,
>
> Under the situation and such circumstance I hope that I have made the right decision. I talk to may friends Bertha and her husband Olive about this, Olive agree that I write to you. Bertha, however, was against it. Nevertheless, I felt I had to write you. I cannot omit what I have seen. When I saw the good within you and how hard your wife was trying; I prayed about it. One word appear before me *repent.* If you repent and run a clean business it is the good within you that will save you, and you will gain what you have lost. Before I continue I must explain something to you. I have eyes and ears that I can see things before it happen. I can tell you about other and what they are thinking and doing. If I am wrong about this it is the first time.
>
> I would like to visit you. I would like to do so when my eyes fully open. I would like to talk to you about what appear before me. They are only partly open. I don't know at the present when they will open. Unfortunate, a curse was put upon them some years ago. I have some people working on them. Everything is being done that can be done. So we will have to wait. As I stated I cannot omit what appear before me, when I was on the jury bench. You feel that this is the end for you. However, it is not. Something appear before me that I must do. It is the good within you that I must use and within that good, you will gain what you have lost. If, however, I am wrong it is the first time.
>
> Why, you let such a relationship exist between you and a man like Hellerman? When I think of the good that I saw within you it does not add up. Where did Hellerman get those fur coats? Does he have any for sail? Omit the question. I really can't afford one, and if I could I probably be afraid to wear it.
>
> Why persecute your wife? Your mistake your guilty then take it out on her. The ordeal you put her through I wonder how she survive through it. One word appear before me brave. She is a brave girl. She love you. She never stop loving you not a single moment. Tell her to please be careful. From what I can see she is still in business. I suggest it is not wise at this time. I believe she is being watch.
>
> That was a good lawyer you had. I entain to send him some custom as soon as my eyes open.
>
> Tell Ostrer I am praying for him.
>
> *Mr. Dioguardi,* I want to ask a favor of you please.
>
> I want you to look upon me as a woman and I look upon you as a man and not white man and black woman. Olive agree with me.
>
> Let's leave color out, *OK.*
>
> I was told you will only have to serve one third of the time given. So relax this is not the end. Soon you will be free.
>
> When I call the Federal information center and the record room yesterday they all know you. They all seem to

> have it in for you. Its seated deep within them like a personal matter.
>
> Sincerely,
>
> Genena

Thus, the juror claims that she has "eyes and ears that . . . can see things before it happen." She can "tell" what other people "are thinking and doing." Her eyes are now "only partly open" because "a curse was put upon them some years ago." She is writing this letter because "[s]omething appear before me that I must do." Although Dioguardi's wife was never in the courtroom, the juror somehow knows that Mrs. Dioguardi "is a brave girl" and "is still in business," but is being watched. As soon as the juror's "eyes open" she intends to send Dioguardi's lawyer some customers. And when she "saw the good within" Dioguardi and how hard his wife "was trying," the word "*repent*" appeared before her.

The letter is staggering in its implications. No special training is needed to appreciate that this juror seems to believe she is clairvoyant and can see things that may not, or could not, be apparent to others, such as what people think or an event before it happens. And if juror Rush actually did believe she was clairvoyant in this way, is it really necessary to spell out why she could not fairly try the guilt or innocence of any man? It seems obvious to me that a "clairvoyant" juror might honestly "see" a defendant's guilt despite the lack of evidence because she can see into the defendant's mind. Or conversely, she might for the same reason divine a defendant's innocence, in the face of overwhelming proof of guilt. A person who was known to regard herself as clairvoyant would certainly not be allowed on a jury in the first place. United States v. Silverman, 449 F.2d 1341, 1344 (2d Cir. 1971), cert. denied, 405 U.S. 918, 92 S.Ct. 943, 30 L.Ed.2d 788 (1972); United States v. Benson, 31 F. 896, 900 (D.Cal.1887). Such a woman would clearly be "incapable, by reason of mental . . . infirmity, to render satisfactory jury service . . . ." under 28 U.S.C. § 1865(b)(4). Cf. Jorgensen v. York Ice & Machinery Corp., 160 F.2d 432, 435 (2d Cir.), cert. denied, 332 U.S. 764, 68 S.Ct. 69, 92 L.Ed. 349 (1947). Moreover, the incapacity on such a ground of even one juror would poison the verdict regardless of the competence of the remaining 11. Parker v. Gladden, 385 U.S. 363, 366, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966) (per curiam); United States v. Rattenni, 480 F.2d 195, 198 (2d Cir. 1973).

The ultimate question, of course, is whether juror Rush was in fact "incapable" of rendering satisfactory jury service, but the precise legal issue before us is whether enough was presented to the district judge to require holding a hearing to determine her capacity to serve. The district court had before it the juror's letter and the views of seven reputable psychiatrists, all of whom rendered expert opinions that the writer of the letter suffered from severe mental illness.[1] According to some of these doctors, the precise diagnosis of her problem would require clinical evaluation through interviews and tests, but all of the phychiatrists agreed on the existence of a seriously disabling thought disorder which in their opinion would have impaired her mental functioning during the trial and her ability to judge the case intelligently. These expert views stand uncontradicted on the record before us. True, the majority opinion refers to them as "essentially horseback uninformed." However, in view of the district judge's oral order, that no one was to contact the juror,[2] these adjectives are simply not justified. Several of the psychiatrists made clear that they would like to know more about the juror. Obviously, the directive prevented defense counsel from attempting any interview, and both defense and government counsel apparently interpreted the order as inhibiting any investigation of the juror, even apart from talking to her.

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[1] The credentials of the seven psychiatrists were set forth in varying detail, but, on this record, all appear to be qualified to give an expert opinion.

[2] The judge stated in open court that juror Rush is not to be contacted by anybody or communicated with by anybody in any possible way, directly or indirectly. Is that clear, gentlemen?

The combined effect of the uncontradicted record and the apparently intended scope of the judge's order requires a remand for a further hearing. The unsolicited letter is bizarre, and seven psychiatrists have given their opinion on the basis of it that the juror was seriously mentally ill during the trial. I do not see how the district court, or we, can disregard these facts. Certainly a defendant is entitled to 12 sane jurors, Parker v. Gladden, *supra*, 385 U.S. at 366, 87 S.Ct. 468, 17 L.Ed.2d 420; United States v. Rattenni, *supra*, 480 F.2d at 198, and if one is incompetent, we should exercise our supervisory power to order a hearing or a new trial just as we would if one turned out to be blind or deaf although no one had noticed it. Possibly this juror is not incompetent; she may just be peculiar. But the record as it now stands cannot justify such a conclusion. It may be that after the record is amplified—at least by cross-examination of appellants' witnesses and by testimony of government experts—the district court might be warranted in finding juror Rush to have been capable of jury service. I express no view as to that. However, at the very least, defendants are entitled to a full hearing on the issue of the juror's competence.

The majority cites a good deal of authority for the proposition that unless there is "substantial if not wholly conclusive evidence" of a juror's incompetence during trial, a post-trial inquiry will not be ordered "merely on the allegations and opinions of a losing party." See, e. g., Peterman v. Indian Motorcycle Co., 216 F.2d 289 (1st Cir. 1954). I do not quarrel with this statement of the law. Indeed, I heartily endorse it since the evidence on this record of the mental incompetence of juror Rush is, as I have indicated, quite "substantial." Moreover, the inquiry here was not triggered solely by "the allegations and opinions of a losing party," but by the unsolicited letter of the juror herself, which was sent only 13 days after the verdict and is itself persuasive evidence of incapacity.[3] None of the decisions cited by the majority involved such an unusual objective fact. In *Peterman, supra*, for example, there was no communication by the juror, which was itself an overt symptom of mental disorder. On the contrary, there was "no suggestion that the juror was insane," 216 F.2d at 293, whereas here the uncontradicted record supports the opposite conclusion. Furthermore, in many cases of alleged juror taint, hearings were actually held or ordered upon remand. See, e. g., Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954); United States v. Hand, 472 F.2d 162 (5th Cir. 1973) (per curiam); United States v. Silverman, supra; United States ex rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970), cert. denied, 402 U.S. 906, 91 S.Ct. 1373, 28 L.Ed.2d 646 (1971). Cf. Smith v. Cox, 435 F.2d 453 (4th Cir. 1970), vacated on other grounds sub nom. Slayton v. Smith, 404 U.S. 53, 92 S.Ct. 174, 30 L.Ed.2d 209 (1971).

I would only add the observation that, far from loosing a Pandora's box of challenges to jury verdicts (as the district court feared), a remand for a hearing here would have almost no precedential value because of the uniqueness of the facts. Nor would a hearing under these circumstances raise the twin spectres of juror harassment or incursion on jurors' privacy during their deliberations. Cf. Miller v. United States, 403 F.2d 77, 82 (2d Cir. 1968). The letter which forms the basis of the present attack on the verdict below was, as I have stressed, unasked for, and not the product of a fishing expedition. Moreover, an inquiry into competence need not entail a probe of jury discussions. I have already mentioned such alternative possibilities of enlarging the record as cross-examination of appellants' witnesses and testimony by government experts. Counsel may also develop evidence by investigating the juror's background or by persuading her to undergo a voluntary mental examination. I see no need to explore every conceivable avenue of investigation, but merely wish to make the point that I am not counseling any general break with the wise policy of protecting the sanctity of the jury room and the privacy of individual jurors.

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[3] There is no hint in the record that the letter was actually solicited or not genuine. Upon remand, those questions could, of course, be explored.

For these reasons, I strongly believe that the district court erred in refusing to make further inquiry into the competence of juror Rush. Therefore, I dissent from the affirmance of the order denying a new trial without a hearing.[4]

SHEL-AL CORPORATION, Plaintiff-Appellant,

v.

AMERICAN NATIONAL INSURANCE COMPANY and Exchange Security Bank, Defendants-Appellees.

No. 73-1965.

United States Court of Appeals,
Fifth Circuit.

March 25, 1974.

April 8, 1974.

Rehearing Denied May 8, 1974.

Owner of real estate which obtained commitment from financier to purchase real estate and lease it back to owner and lend owner construction funds secured by mortgage on leasehold estate brought action alleging that financier was not entitled to retain stand-by deposit fee on failure to consummate the loan agreement. The action was removed from state court. The United States District Court for the Northern District of Alabama at Birmingham, Sam C. Pointer, Jr., J., entered judgment for financier and owner appealed. The Court of Appeals, Tuttle, Circuit Judge, held that prior owner's reservation of mineral rights, coupled with a plenary release of all claims for injury which might be suffered by landowner as a result of either past or future mining operations, was a sufficient impediment to owner's title to prevent there being a "good and merchantable fee simple title"; and that evidence sustained finding that the $48,000 stand-by deposit fee was liquidated damages rather than the penalty.

Affirmed.

1. Vendor and Purchaser 🔑130(2)

Where real estate which financier was to purchase and lease back to owner was subject to mineral reservation of prior owner coupled with a plenary release of all claims for injury which might be suffered by the landowner as a result of either past or future mining operations, there was a sufficient impediment to title to prevent there being a "good and merchantable fee simple title," and financier properly raised objections to the mineral reservation and damage release clause.

See publication Words and Phrases for other judicial constructions and definitions.

2. Vendor and Purchaser 🔑129(1)

Fact that financier which made commitment to purchase and lease back real estate had previously dealt in property containing mineral reservations did not render improper financier's objections to mineral reservation and damage release clause as a title defect.

3. Contracts 🔑313(2)

Where financier which issued purchase and loan commitment documents to owner of land on November 19, 1969

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[4] I agree with the majority's disposition of the other points raised by appellants.

AMENDED
JUDGMENT AND ORDER C ATION (Revised Dec. '66)

Lasker, J.
Cr. Form No. 101

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
SEP 28 1973
S.D. OF N.Y.

UNITED STATES OF AMERICA

v.

MICHAEL HELLERMAN

No. 71 cr 558

On this 28th day of September, 1973, ~~came the attorney for the government~~ and ~~the defendant appeared in person~~ this Court, after due consideration, grants the defendant's motion pursuant to Rule 35 F.R.Cr. P. and further reduces the sentence imposed on 11-6-72 to the extent indicated.

IT IS ADJUDGED that the defendant upon his plea of guilty to count 15 and the Court satisfied that there is a factual basis for the plea

has been convicted of the offense of unlawfully, wilfully and knowingly, by use of interstate commerce and the mails, use and employ in connection with the purchase and sale of Securities to wit, Belmont Franchising on March 9, 1970 to Taff Foods, Inc. in violation of Title 15, U.S. Code, Sections 78j(b) and 78ff; Title 18 U.S. Code, Section 2

as charged in count 15

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that imposition of sentence be suspended and the defendant is placed on probation for a period of FIVE years to be served consecutively to and not concurrent with the sentence imposed under 70 cr 967 ther period of said probation to commence at the expiration of the custody served under 70 cr 967. The probation so imposed shall be unsupervised. The Defendant shall not engage in the securities business or act as an advisor to any one other than the members of his immediate family and the defendant shall make available a fund of $12,800/00 to be used towards the restitution of his victims to the extent that they can be indentified and in accordance with a plan of restitution to be approved by his Probation Officer. Open counts one through fourteen and sixteen through forty are dismissed on motion of defendant.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

Morris E. Lasker
~~MORRIS E. LASKER~~
United States District Judge.

~~RAYMOND F. BURGHARDT~~
Clerk.

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[1] Insert "by [name of counsel], counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty, and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

[4] If sentence is imposed but execution suspended, and probation ordered, enter here (1) sentence or sentences, specifying counts if any, (2) whether sentences are to run concurrently or consecutively, and if consecutively, when each term is to begin with reference to termination of preceding term or to any outstanding or unserved sentence, (3) whether defendant is to be further imprisoned until payment of fine or fines and costs, or until he is otherwise discharged provided by law, (4) the facts regarding the suspension of the sentence or sentences and (5) the period of probation.

If sentence is suspended and probation ordered, enter here the following: "The imposition of sentence is hereby suspended and the defendant is placed on probation for a period of years from this date."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

against

LOUIS OSTRER,

Defendant.

71 Cr. 558 DNE

NOTICE OF MOTION FOR NEW TRIAL AND FOR EVIDENTIARY HEARING

SIR:

PLEASE TAKE NOTICE that on or after December 16, 1974, at a time designated by the Honorable David N. Edelstein, Chief Judge of the United States District Court for the Southern District of New York, at the United States Courthouse, Foley Square, New York, New York, the undersigned counsel will move the Court, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, to grant the Defendant herein a new trial.

The grounds for said motion, more fully set forth in the appended affidavits of Alan Dershowitz, Esquire, and to be more fully set forth in additional affidavits which are currently in preparation and which will be submitted to the Court within one week of December 16, 1974, include the following:

1. Subsequent to the affirmance of the Defendant's conviction by the United States Court of appeals for the Second Circuit on January 4, 1974, newly-retained counsel for Defendant Ostrer

discovered an apparent error in the trial transcript of evidence, which error was probably responsible for the District Court, the Court of Appeals, and the prosecution and the defense attorneys at trial misunderstanding a vital point, which point, if properly understood, would have resulted in the disqualification upon jury selection voir dire of a juror who ultimately sat on the case, or, had the point been understood after the trial and conviction, would probably have resulted in this Court's granting Defendant's earlier-filed motion for a new trial on the basis of violation of his Fifth Amendment Due Process rights.

2. Subsequent to the conviction of the Defendant, and subsequent to all appeals to date in this case, new counsel for the Defendant discovered evidence which reasonably leads to the conclusion that the Government was privy, prior to and during trial, confidential and privileged communications between the Defendant and his attorneys, which communications were obtained from New York State authorities, who in turn obtained them by means of wiretapping and electronic surveillance of the Defendant's premises, all in violation of the Defendant's Fourth and Sixth Amendment rights.

The granting of the motion for a new trial is in the interests of justice.

The Defendant will further move the Court to convene an evidentiary hearing on the motion for a new trial.

Yours, etc.,

Alan Dershowitz
41 Concord Avenue
Cambridge, Massachusetts 02138
Office tel. (617) 495-4617

Appended:

Affidavit of Alan Dershowitz (in support of ground #1)

Affidavit of Alan Dershowitz (in support of ground #2)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, against LOUIS OSTRER, Defendant.	71 Cr. 558 DNE Affidavit of Alan Dershowitz in support of Motion for New Trial (on Fifth Amendment ground)

COMMONWEALTH OF MASSACHUSETTS

COUNTY OF SUFFOLK, SS.:

ALAN DERSHOWITZ, being first duly sworn according to law, deposes and says:

1. I am Alan Dershowitz, an attorney at law and member of the Bars of the Commonwealth of Massachusetts, the United States District Courts for the District of Columbia and the District of Massachusetts, the United States Court of Appeals for the Second and District of Columbia Circuits, and the Supreme Court of the United States. I was retained as counsel for Louis Ostrer to file a Petition for Writ of Certiorari in the Supreme Court of the United States,

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and I have been representing him since that time with respect to the instant motion for a new trial. I have appeared pro haec vice before this Honorable Court in in several cases, including United States v. Huss, et ali., Nos. 72 Cr. 715 and 72 Cr. 778 (as counsel for Sheldon Seigel), and United States v. Rosner, which is currently pending before the Court of Appeals.

2. At the time I was retained to prepare the Petition for Writ of Certiorari, Mr. Ostrer's conviction has already been affirmed by the United States Court of Appeals for the Second Circuit. United States v. Ostrer, F.2d (No. 114, September Term, 1973, decided January 4, 1974). I was not involved in the case until after the aforementioned affirmance. While I was preparing the certiorari petition, I realized that a probable error in the trial transcript, and a misunderstanding emanating therefrom, probably accounted for the fact that this Court failed to dismiss from the jury panel one of the jurors who eventually sat on this case, one Genena Rush. I further realized that had this error been discovered after the trial, it would probably have resulted in this Court's granting the Defendant's first motion for a new trial, which was filed with the Court and then denied on July 18, 1973. The error was not discovered

until I was preparing the certiorari petition. The nature of the error is described, _infra_.

3. The Defendant's earlier-filed motion for a new trial raised the ground that subsequent to the verdict, one of the jurors -- Miss Genena Rush -- wrote a letter to one of the Defendants, which letter was _prima facie_ evidence that Miss Rush was "incapable, by reason of mental ... infirmity, to render satisfactory jury service" (28 U.S.C. sec. 1865). The letter and other facts surrounding the case are discussed extensively in the opinion of this Court (a copy of which is appended hereto as Exhibit A), and in the opinion of the Court of Appeals (appended hereto as Exhibit B).

4. Both the District Court and the Court of Appeals appeared, in their respective opinions, to take the position that the Defendant did not present sufficient evidence in support of the motion for a new trial to justify the Court's holding an evidentiary hearing on the question of whether or not juror Rush was in fact suffering from an incapacitating mental infirmity at the time of the trial. Both courts seemed to agree, however, that if the Defendant had been able to present some evidence that Miss Rush had, in addition to having written the letter, been a patient at a mental hospital or otherwise been declared mentally incompetent, that evidence would have mandated that an

evidentiary hearing be held and, if the hearing bore out these allegations, a new trial would have been required.

5. The District Court, in denying the motion for a new trial, based its decision largely upon the Court's opinion that, in her responses to the Court's questions on pre-trial voir dire, juror Rush, by her demeanor and responses, gave no evidence that "her reasoning abilities or mental processes were deficient." The Court of Appeals relied heavily upon this finding, and it quoted in its opinion extensively from the pre-trial voir dire of juror Rush. After quoting Chief Judge Edelstein's opinion describing this voir dire, the Court of Appeals said.

> "Examination of the juror on the voir dire disclosed that she was then employed by Flower Fifth Avenue Hospital as a patient attendant assisting the nurses and had been so employed for four years....Prior to her current hospital employment she was a silk finisher in a cleaning shop in the Bronx."

(Appendix B, at 39). And later in its opinion, the Court of Appeals noted that Miss Rush "has held steady employment over the past four years as a nurse's aide at Flower Fifth ovenue Hospital...." (Appendix B. p. 44) (emphasis supplied). Thus, both Courts premised their decision on the "facts" that juror Rush had never been adjudicated insane and that she had been steadily employed since 1944 and had been employed for the past four years by "Flower Fifth Avenue Hospital as a patient attendant," or a "nurse's aide". On the record of this case, however, properly read, it cannot be assumed that juror Rush had never been adjudicated insane. Nor can it be assumed that her statements on voir dire concerning her alleged employment record were based on real, rather than imagined facts. It is at least equally likely, and under all of the circumstances of this case is it considerably more likely, that she was adjudicated insane. No one has ever checked the relevant records or asked her, since the trial judge precluded any such investiagion. Moreover, her statements on voir dire concerning her employment record are pregnant with ambiguity that cannot be cleared up without a hearing. At first she indicated that she had been employed at Flower Fifth Avenue Hospital for "a full year" and then for "four years."

6. Most significantly, however, and critical for consideration of the instant motion, juror Rush on voir dire described herself as "a patient attendant". This phrase bears two equally plausible constructions: (1) that she is herself a patient, working part time as an attendant; or (2) that she is simply an attendant who attends patients. Many thousand of mental patients are, in fact, employed as patient-attendants in hospitals throughout the country. And Flower Fifth Avenue Hospital -- the hospital in which juror Rush claimed to be a "patient attendant" -- does have a psychiatric

service and does have a program of employing psychiatric patients as part-time attendants, according to information learned by counsel during an investigation conducted subsequent to the Court of Appeals' affirmance.

7. The error apparently made by all courts and all counsel involved in this case through the Court of Appeals stage turns upon the interpretation of the key phrase "patient attendant" or "patient-attendant." Appendix C , at page 59 , omits the hyphen between these two words, thereby giving the impression that juror Rush said on voir dire that she was a person who attended patients. Had the stenographer placed a hyphen between the words "patient" and "attendant", the phrase would have instantly been transformed into evidence that juror Rush was at that very instant a patient in the psychiatric ward of the Flower Fifth Hospital who, in addition, helped the nurses and doctors care for other patients, that is to say, that juror Rush was both a patient and an attendant.

8. Of course, all attendants attend patients, so the "patient attendant" interpretation assumed by the Courts and all prior counsel would require a redundancy. The Court of Appeals, however, subtly transformed the "patient attendant" response given by juror Rush on voir dire into the description "nurse's aide" (at page 44, Appendix B) without giving any thought, apparently, as to what the phrase would mean had the

Court stenographer hyphenated "patient-attendant."

9. In addition to learning since the Court of Appeals affirmance that Flower Fifth Hospital has a program which utilizes psychiatric patients as attendants for other patients, Counsel has also obtained information believed to be reliable that juror Rush had, prior to the trial, actually been a patient in the psychiatric ward of a major city hospital. This makes it substantially more likely that Counsel's interpretation of the _voir dire_ segment is correct, and that juror Rush may indeed have been a psychiatric patient at the time that she served on the Ostrer jury. This would help explain the bizarre letter that she sent to a defendant after the verdict. Such being the case, under the opinions of both the District Court and the Court of Appeals, an evidentiary hearing is required, after which a new trial will almost certainly have to be granted.

10. Counsel has not been able to learn additional information about juror Rush's psychiatric history, since the trial judge's order that the juror not be contacted, directly or indirectly, precluded any further investigation. At this point, an evidentiary hearing is needed in order to fill out the picture.

11. This scenario, as it was played out in the District Court and the Court of Appeals to date, based as it was upon a probable error in understanding what Juror Rush was saying on _voir dire_, was raised for the

first time in Mr. Ostrer's Petition for a Writ of Certiorari. In its opposition to the Petitioner, the Government took the position that it was more appropriate for Mr. Ostrer to raise this issue before the District Court, rather than in the Supreme Court:

> "The only other suggestion of mental incompetence adduced by petitioners is the contention, raised for the first time in this Court, that when the juror in question stated on voir dire that she was a 'patient attendant' at Flower Fifth Avenue Hospital, she did not mean a 'nurses aid' but a mental patient who worked part-time attending other patients. There is no evidence to support a conclusion that Flower Fifth Avenue was a mental hospital or that the juror was a mental patient there. This speculation which is unsupported by the record before this Court, can afford no basis for relief here. Petitioners' remedy, if any, must be before the district court. (emphasis added) (Government's brief in opposition at p.7. n.9.)

The Supreme Court denied certiorari on October 7, 1974, and consequently, in accordance with usual practice and with the Government's suggestion as quoted above, Defendant has returned to this Court in order to correct a manifest injustice resulting from an apparent misunderstanding.

Alan M. Dershowitz

Signed and sworn to before me on this
11th day of December, 1974, at Boston,
Massachusetts.

Harvey A Silverglate
Notary Public

My Commission expires July 18, 1980

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

UNITED STATES OF AMERICA, :

-v- :

LOUIS OSTRER, :

Defendant. :

- -X

71 Cr. 558-CLB
11-1572

MEMORANDUM AND ORDER

#43223

Brieant, J.

The prior oral order of this Court made herein on March 20, 1973 is modified so as to provide that a subpoena *duces tecum* shall issue returnable before me at a time and place to be fixed therein, directed to Flower-Fifth Avenue Hospital, requiring the production of any and all records of the employment, and/or patient status, if any, of Miss Genena Rush. The form of the subpoena shall be settled on notice, or if possible, by agreement, and submitted to the Court for approval prior to issuance. Except as so modified, the prior order above referred to is continued in full force and effect and shall be obeyed.

Correspondence with counsel since the hearing before me held September 5, 1975 indicates that the parties are prepared

page 2
illegible

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to concede the correctness

[illegible] and completeness of copies of certain tapes now in possession of an Assistant District Attorney of New York County, which are said to include conversations between defendant and Maurice Edelbaum, Julius November, Henry Boitel and Richard Wynn. Counsel shall bring these copies into Court by issuance of such process as may be appropriate or by agreement with the District Attorney in lieu of subpoena. The United States Attorney and counsel for movant shall be permitted

to listen to the tapes jointly

[illegible] jointly, in the Courthouse, and shall index, segregate, mark, or, if possible, transcribe such parts as will be relied on in connection with the Rule 33 motion presently pending before me.

In all other respects, the Court retains jurisdiction of that motion, and will make further directions as to the procedure to be followed after the foregoing directions have been complied with.

So Ordered.

Dated: New York, New York
October [illegible] 1975

CHARLES L. BRIEANT, JR.

CHARLES L. BRIEANT, JR.
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA :

vs. :

LOUIS OSTRER, : 71 Cr. 558 (CLB)

Defendant :

- - - - - - - - - - - - - - - - - - x

Before:

Hon. Charles L. Brieant, Jr.,
District Judge

New York, N. Y.

December 19, 1975 - 12 noon

APPEARANCES

Thomas J. Cahill, Esq.,
United States Attorney
For the Government
By: Lawrence B. Pedowitz, Esq.,
Assistant United States Attorney

Alan Dershowitz, Esq. and
Harvey Silverglate, Esq.,
Attorneys for Defendant

MR. PEDOWITZ: Ready for the Government, your Honor.

MR. DERSHOWITZ: Ready for the defendant, your Honor.

THE COURT: All right. Gentlemen, this is a continuation of the hearing which I began previously with respect to Mr. Ostrer's Rule 33 motion, and you have all, of course, received my October 8th memorandum and order and I wanted to address myself first to the aspect of Mrs. Rush.

The Court has attempted to balance, in this matter, the rights of the accused with the rights of the juror, who should not have her affairs pried into, and a subpoena was issued and served which required records of the Flower Fifth Avenue Hospital to be delivered directly to my chambers, and that subpoena was issued on November 11th and served on the 12th.

A file has been returned to the Court pursuant to that subpoena by Mr. James A. Lewis, whose title is the Benefits Manager of New York Medical College, and that file contains two separate documents, perhaps I should say three documents.

One of these documents is merely payroll changes for Mrs. Geneva Rush and requisitions for her uniform allowance, and I consider that irrelevant to this particular hearing.

There is an additional document, a set of central records, socalled, made for the computer to indicate pay and employment status; and also another document, called a pre-employment checkoff list, and an employment application form.

What I propose to do with these documents is to read into the record the relevant material therein and then I will permit counsel for Mr. Ostrer and counsel for the Government to inspect these personnel r-cords here today in my presence, to ascertain that the Court has correctly stated the facts therein, and if there are any other facts indicated by the document which you wish to have me make a finding concerning I will do that also, and then I am going to seal these as part of the records in the case.

I am following that procedure in order to serve the two necessities we have here, one to find the truth about Mrs. Rush's status with the hospital, and the other is to protect Mrs. Rush from undue burden as a result of having discharged her public duty by serving as a juror.

I will state now for the record that the file contains the following documents:

There is an application for employment on a printed form of the New York Medical College-Flower & Fifth Avenue Hospitals, and that hospital, under the heading "Type of Work Desired," the word "nurses' aide, any shift." And someone has put in next to it "P/Att," which the Court takes it stands for patient attendant.

The lady states thereon that she can start working as soon as possible, shows herself to be a high school graduate, and gives prior work history as a silk finishing employee in a dry cleaner's business in New York City and work as a nurses' aide in the Baltimore General Hospital between 1950 and 1952.

The application is in all other respects a routine employment application signed by Geneva Rush on February 25, 1969.

The next document in the file is a reference from Mrs. Carter, Dean of Women at the YMCA, 180 West 135th Street, to the effect that applicant is an honest person, that her general ability is good or dependable, and cooperativeness is very good, her sense of responsibility good, and h-r character above reproach.

That is undated. It shows that the position applied for is that of nurses' aide. There are a couple of other similar references attached, and then a reference to the Nursing Department from the Personnel Department dated March 11, 1969.

It says, "Name of applicant: Geneva Rush. This applicant is being referred to you for consideration re the position of P/Att," which the Court takes to mean patient attendant, "eve shift."

The balance of the file shows that she was in fact employed from March 17, 1969 as, a job title, "Pat. Attendant," that she was a regular, full time employee and a member of the regular collective bargaining unit.

It shows that she had a uniform allowance and indicates her status as divorced, her citizenship is United States, and the file suggests a regular history of employment in the capacity or job title of patient attendant, which is spelled out on at least one of the forms which I am presently looking at.

It shows that she was employed under a union contract, and there is a check mark in a box which says "per union contract"; that she received a uniform allownace; and at least one time in 1970 she was working on the evening shift full time.

The addresses listed her are not the addresses of the hospital, suggesting to the Court that she had places of residence other than in the hospital. And, as I said before, the record clearly shows that she had a laundry allowance, a uniform allowance and a full time salary per union contract.

Her shifts varied. She did not always work the evening shift. She received shift differentials when she worked the evening shift.

There is an entry as of January 6, 1971: "We have checked your records and have found that to date you have had nine sick days. You are hereby advised you have a total of thirteen sick days until your anniversary date, date of hire, in 1971."

Now, I think that is a full statement of the material produced pursuant to the subpoena relating to Mrs. Rush.

There is an additional document dated March 12, 1969, which suggests that she took a pre-employment physical examination. There may be some doubt as to the validity of that inference, but the paper could be so read.

Now, I'm prepared to take a brief recess and permit counsel for the Government and for Mr. Ostrer to examine these documents, from which I have been making the statements that I've just made, in the presence of the Court. Following that I'll direct that they be sealed and I'll deal with any further requests which you may make as a result of your examination.

I think it is fair to state that everything in the file which the Court has seen points to Mrs. Rush as being a full time employee of the hospital, a union member, in the hired capacity of a patient attendant, and not living in the hospital but living at various other addresses therein set forth, where she moved to from time to time.

Now, is there anything further that any of you want to say on the record before I have the examination?

MR. PEDOWITZ: Nothing, your Honor.

MR. DERSHOWITZ: Nothing from the defendant, your Honor.

THE COURT: All right.

The record will show that the Court's use of the word "Geneva" as the first name of the lady is the name borne out by the file and not Genina, as it has been from time to time stated, including by my own memorandum order.

(Pause)

MR. DERSHOWITZ: There is one note that we might want to note or bring to your Honor's attention. I don't have the vaguest idea what it means, except that the address is listed as H.E.W., which sounds like it might be the Department of Health, Education and Welfare. And since the Department of H.E.W. does run facilities --

THE COURT: All right. What was the date of the trial in this case?

MR. DERSHOWITZ: January 1973.

jg [8]

THE COURT: All right. This is dated July 1, 1973. So I don't believe it means that. I think somebody has just written a number here in a place that is ordinarily used for an address change. But I'll disregard that because that is after the verdict.

(Pause)

MR. DERSHOWITZ: Your Honor, under the circumstances, it is necessary to point out all ambiguities. They may just be ambiguities.

THE COURT: I understand. That is what you are examining this document for, in order to permit you to point out any matters which you think are of concern.

MR. DERSHOWITZ: Under "Address change" there is a symbol that could possibly be a large P, and I just note that because of its possible relationship to the word "Patient."

THE COURT: All right. I'll bring the man down here and get him to tell us what it means. This is an entry for November 1, 1970.

I have to tell you that I think you found a dry hole as far as Mrs. Rush is concerned. But, if you think that P down there is a P, and if you think it means that she was a patient -- she told me she had no patient files for her -- I'll get the man to come down and explain to me what

"P" is.

MR. DERSHOWITZ: As I say, your Honor, I am just pointing out possibilities as I go through it.

THE COURT: I understand. That's what I want you to do.

MR. DERSHOWITZ; All right. Thank you.

(Pause)

MR. DERSHOWITZ: Again, your Honor, we have no reason to suspect this means anything, but it would be interesting to find out what "CBU" means. None of the three of us have been able to figure it out.

THE COURT: The Court understands that "CBU" means collective bargaining unit.

MR. DERSHOWITZ: Fine. That seems reasonable.

THE COURT: The scope of this hearing is to ascertain whether the lady perjured herself on the voir dire and deluded trial counsel so that he permitted a psychotic patient to stay there, believing that she was a fully employed, working person serving in the job title of patient attendant at a substantial hospital.

That's what I am here to determine, not to pick on every little nit that is on these papers.

MR. DERSHOWITZ: We understand that.

THE COURT: But you continue with your examination and I'll deal with each matter as it comes up. But the real issue before me is did she lie on the voir dire.

(Pause)

MR. DERSHOWITZ: Just to have the record complete, under "Address change" there is again given a series of numbers which conceivably can be a wrong number. I just point it out.

THE COURT: All right. I will look into that. You have reference to an entry which appears as if it is dated 3/1/70, and I'll attempt to find out what they mean by that.

You see, if it were shown she had occasionally been a patient, that would not lead to a conclusion that she lied or misled counsel on her voir dire examination, which is all we are really here for. It was suggested by you, and I thought the suggestion had merit, that perhaps the statement that she was a patient attendant at Flower & Fifth Avenue Hospitals was meant by her tosay that she was a patient who helped take care of the other patients.

That was the argument made before me when you were here before, on September 5th, and that argument turns out to be totally without foundation in fact. The underlying factual basis for it is simply non-existent.

All right.

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(Pause)

MR. DERSHOWITZ: Your Honor, at least we would like to make a note of the fact, in the event it is relevant, that she did receive -- perhaps we shouldn't put this on the record, public record. We would be happy --

THE COURT: No. I wish to have a complete record here. The record may show that there was a disciplinary warning notice filed September 16th, 1970 and it says that on September 2, 1970 the juror failed to report on duty and did not call nor notify anyone of the reasons for her absence and that she was warned and admonished.

But I must focus your attention again on the purpose of this hearing and again repeat that I do not believe in post-verdict interrogation of jurors or investigation of jurors or harassment of them. It just turned out that the suggestion made about this juror, that she might in fact be a psychiatric patient rather than a full time employee, was so significant under the circumstances that the Court believed that there should be further inquiry.

Now, the further inquiry, in my opinion, clearly shows that the lady was a full time employee, a member of the collective bargaining unit, receiving a uniform allowance and what may be described as a reasonable salary, and that there is just no substance to this argument.

However, these matters cannot be litigated in a vacuum and the only way that I can be sure of having an adequate record is to permit this type of examination which is going on right now, following which I will see these documents for any consideration which an appellate court may require.

MR. DERSHOWITZ: Your Honor, we would also have no objection, just for the record, even to have this part of the proceeding sealed so that Mrs. Rush's name is not --

THE COURT: Her name is already in the reported cases under the Dioguardi decision.

MR. DERSHOWITZ: I understand that. I mean as far as, for example, the disciplinary matter. We have no reason to have that on the record.

THE COURT: That can happen to anybody, that they don't show up for work and don't call in ahead of time and get warned and admonished. That is commonplace. Anybody who hasn't had that happen to him or her in their career either has a very easy job or has been lucky. It certainly has no bearing on the validity of the voir dire conducted by the trial court.

MR. DERSHOWITZ: Here, your Honor, I do think we should note that the record indicates she has been cleared by some medical group to work. Again, that is possibly consistent with the routine.

THE COURT: This is the date of employment, March 18, 1969, a new employee.

MR. DERSHOWITZ: We only note that in the sense that each of these standing alone may mean nothing, and indeed all of them together may mean nothing, but --

THE COURT: Wait a minute now. Let's address ourselves to this document. Can you find any inference from this document other than that this person, and others, was cleared to work by the Health Service --

MR. DERSHOWITZ: Only, your Honor, that it is possible that --

THE COURT: -- on March 18th.

MR. DERSHOWITZ: -- that routinely people aren't considered for medical examinations.

THE COURT: Oh, garbage. Let's go on with this examination. That is silly. That is just simply ridiculous. The employment documentation there suggests that they intend to have her examined. It is right on the printed form.

Do you think you can go to work in a hospital without having an examination?

(Pause)

MR. PEDOWITZ: Your Honor, I note that one of the questions on the application is, "Have you been under the care of a physician during the past five years?" and the answer which follows is "No."

THE COURT: All right. That's just about as irrelevant as the observations which defendant's counsel have been making from the file. But the record may so indicate.

I want both of you to focus on the fact that we are talking about the validity of the voir dire in this case, whether the jury member misled the examiner or whether the attorney, concluding whether or not to exercise his peremptory challenges or his challenges for cause, was inadvertently misled to the detriment of his client by the answers which the woman gave which led him and the Court to believe that she was a full time employee of the hospital and which, it was contended quite plausibly on the motion before me, should have indicated that she might have been a psychiatric patient in the hospital who was being allowed to work on the ward and assist in the care of other psychiatric patients.

It is a perfectly plausible argument. That is the reason why I conducted this hearing here, and I thhink the answer to it is clear beyond peradventure.

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(Pause)

MR. DERSHOWITZ: Can we go off the record for one second?

THE COURT: I prefer you not be off the record.

MR. DERSHOWITZ: By all means. I just wanted to indicate that we didn't see the pre-employment checkoff list, which indicated that a medical examination is routine, until the very end.

THE COURT: Yes. But I stated that in my resume the file on the record that I made before you began.

MR. DERSHOWITZ: I'm sorry. We didn't catch that.

THE COURT: All right. I'm not certain that that is the inference which follows from the document. But perhaps it is.

(Pause)

THE COURT: At this time I will have the Clerk mark for identification the two documents, a group of documents which are clipped together as Exhibit 1 and a pre-employment checkoff list dated March 12, 1969 as Exhibit 2, and the payroll check record, which the Court did not exhibit to counsel, as Exhibit 3, and the subpoena itself as Exhibit 4.

And the Court will direct that these documents be sealed, not to be reopened except upon order of the Court or upon order of a higher court.

xxx (Court Exhibits 1, 2, 3 and 4 were marked.)

THE COURT: And I now find that there is no substance or merit to the claim that the juror Rush lied or misled the Court or counsel upon her voir dire examination at the time of the tiral, and that the documents produced pursuant to the subpoena by Flower & Fifth Avenue Hospitals show beyond peradventure, and the Court now finds, that Mrs. Rush was a full time employee of the hospital in the capacity of patient attendant assigned to the Nursing Service of the hospital and a member of the collective bargaining unit, receiving a salary and a uniform allowance.

Now, this brings me next, gentltmen, to the branch of the motion having to do with the tapes, and I would like to take a status report from you while you are here in connection with your compliance until now with the Court's October 8th memorandum and order.

Where do you gentlemen stand with respect to these tapes?

MR. PEDOWITZ: Your Honor, I believe the Government has had the tapes delivered to your chambers. I assume that is correct.

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(Pause)

THE COURT: I am advised that they were delivered to chambers by somebody. I did not know at the time who delivered them and simply assumed that it was the District Attorney of New York County who was making the delivery. And immediately upon their arrival in chambers, pursuant to my direction, they were delivered to the Clerk of this Court to be put in the safe, and I understand that's where they are.

I am insistent that a proper chain of custody be preserved with respect to these tapes. I don't want the tapes kicking around the courthouse or in the possession of one side or the other, where anyone later could raise any innuendo that they might have been altered or affected in any way.

I want to set immediately directions for the United States Attorney and counsel for the defendant to listen to the tapes jointly and to set apart, and if possible transcribe and make available to the Court, such parts of the tapes as they will rely on to support their respective contentions, and I think that must be done promptly.

This is an early 1971 indictment, and if there is to be a new trial, it has to be decided promptly; and if there is not to be, then that has to be decided promptly.

So I am going to make a suggestion to you that you go right to work on these tapes. It isn't simply enough to say "Yes, I think we ought to make a date." We ought to make a date by agreement.

Mr. Silverglate, are you going to do the tape listening or does Professor Dershowitz plan to do that himself?

MR. DERSHOWITZ: We plan to do that jointly and to divide the function to the extent possible. But we are prepared to proceed with despatch.

THE COURT: This particular time of year should be a very convenient time for everybody. There are not a lot of jury trials going on here.

I would like to have you start together on Monday. I don't see any reason why you couldn't start Monday. Make arrangements through chambers or with the Clerk of the Court or with the U. S. Attorney to get a safe room where they can be kept and listened to, and Mr. Pedowitz will segregate and set apart those portions of the tapes that justify the inference he wants the Court to draw and the defendant can do likewise.

MR. DERSHOWITZ: What we think would expedite matters most, if possible, would be to have Monday, indeed as soon as possible, a certified authorized service make duplicates of the tapes, that is, make transcribed duplicates of the tapes, let the originals remain in the courthouse, let there be a duplicate for the United States Attorney and a duplicate for us.

We would prefer to do it alone, and I think we can do it much more quickly if we did it alone. We can do it day, evening --

THE COURT: You are prepared to stipulate that it can go to a particular named service for that purpose?

MR. DERSHOWITZ: Yes.

THE COURT: How about you, Mr. Pedowitz?

MR. PEDOWITZ: I am perfectly in agreement with that, your Honor.

THE COURT: All right. I hesitate to make this inquiry, but how about the cost of this operation?

MR. DERSHOWITZ: We would be prepared to divide that cost with the Government.

THE COURT: You are? All right.

Is that agreeable?

MR. PEDOWITZ: Your Honor, I don't want to commit myself to any financial endeavor which I can't get agreement for in my office. I'll have to check.

THE COURT: You had better find out very promptly, because the alternative to that will be that people are going to come in and, just as if you had a trial, you are going to sit and listen to the tapes. That is the only other way to do it, listen during business hours jointly, and you can skip over the material that you find irrelevant and cull out, each of you, what you think ought to be presented to the Court.

The Court does not intend to listen to any tapes that are not relevant to the issues of this motion. I will only listen to the tapes, those portions of the tapes, which each of you say substantiate your contention here.

Now, there remains the evidentiary question of exactly what information Mr. McGuire received from the Assistant District Attorney of New York County who had been privy to the tapes, and it may well be that I will have to have an evidentiary hearing on that as soon as you finish listening to the tapes, because I don't think the proper witness could be cross examined very readily except by an attorney who has heard the tapes.

When I say "cross examined," I would say examined in chief as well as cross examined.

So, can we have a schedule on this? I'm assuming that you can get these duplicated, Mr. Pedowitz. If the Office can't pay for a simple thing like that, then things have come to a sorry state.

MR. DERSHOWITZ: Could we have any idea at this point, better than we did previously, as to the exact number of tapes or exact length in terms of time? That would help us with the schedule, sir, the number of hours.

THE COURT: I certainly do not have any answer to that inquiry. I have never examined the tapes. The last thing in the world I want is tapes of this sort in my chambers, where they might be amenable to loss or theft or anything like that. I banished them immediately to the Clerk's safe and I did not count them or even open the box.

One other question is, does your arrangement with the District Attorney permit these to be duplicated?

MR. PEDOWITZ: I don't think that will be a problem, your Honor. We don't have the originals. We have copies of them.

THE COURT: I think you should go right at duplicating them and come back and give me a progress report in about three weeks.

MR. PEDOWITZ: I think that's fine, your Honor. The only estimate I have ever heard of the length of the tapes is 70 hours.

THE COURT: That is a lot of time.

MR. PEDOWITZ: I agree.

THE COURT: And most of it is probably clearly irrelevant to this motion, and the only way to do it is to listen. This is a field day for the paralegals and the student assistants.

All right. I'll give you a date to come back and give me a progress report. I would hope you will be able to have listened to the tapes and at least culled out what's in there.

MR. PEDOWITZ: Your Honor, I will endeavor on Monday --

THE COURT: I hope there is more in there than there was in Mrs. Rush's file.

MR. PEDOWITZ: I will endeavor on Monday, if this is agreeable to Mr. Dershowitz and Mr. Silverglate, to have the tapes duplicated. I don't know whether they want to be here while I take them out of the safe and have them sent over to a duplicating service.

MR. DERSHOWITZ: We accept Mr. Pedowitz' assurances, as long as he maintains the chain of control and custody over them.

THE COURT: Do you understand what he means by "chain of custody and control over them"? That means you have to walk to the service and wait there while they duplicate them.

MR. DERSHOWITZ: No, no. I think it would be

~nough if Mr. Pedow-tz personally took them over to the service and if it was a reliable service, used by --

THE COURT: All right. Clear the name of the service with counsel for the defendant.

MR. PEDOWITZ: Your Honor, is it sufficient that I have someone from my office deliver it, one of the messengers from our office? Obviously that person will be prepared to testify, if that becomes necessary.

MR. DERSHOWITZ: Yes, yes. I have no problem with that, as long as you take responsibility.

MR. PEDOWITZ: As far as waiting at the duplicating service, I think it may take --

THE COURT: He said you don't have to. So you are ahead on that one, Mr. Pedowitz. He said you don't have to. He is willing to permit you, assuming he knows the name of the duplicating service in advance, to have a responsible employee from the United States Attorney's office deliver them ot that service and pick up from that service.

Do I state it correctly, Mr. Dershowitz?

MR. DERSHOWITZ: Yes, you do, your Honor.

THE COURT: All right. And it is so ordered. Then, as soon as you get them back, you are immediately to go forward diligently listening. I would like you to come back and give me a status report at a date which I am about to fix.

MR. PEDOWITZ: I am wondering whether or not counsel can cut down on the number of tapes we have involved here if we can ascertain precisely what dates these particular tapes were made.

There was a meeting sometime in late 1972, I believe in December of 1972, between Mr. McGuire and Mr. Fine. Are we to undertake to listen to tapes which were made after the date of that particular meeting?

THE COURT: Was there only one meeting with Mr. McGuire and Mr. Fine?

MR. PEDOWITZ: Those are the statements made in the affidavit, certainly, your Honor.

MR. DERSHOWITZ: Our position is as follows: We would like to listen to all the tapes that are available, although of course the Government is free to stop listening at any point it would like to. If we find nothing of relevance after the date on which it is stated no further communications occurred, we would of course communicate that to the Government.

Only if we find material subsequently which may cast doubt on the statement that no further communication was had would we --

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THE COURT: I would have to say, and I don't mean this critically, any responsible lawyer faced with this problem, whether he represents the defendant or the Government, ought to listen to all the tapes. That's just my own viewpoint. And whether they are admissible on the hearing or relevant after the date of the last meeting between Mr. Fine and Mr. McGuire is something I don't have to determine now.

But if you don't know what's on the tapes, you don't know what the problem is.

MR. DERSHOWITZ: Your Honor, in terms of dates, I would just like to make one personal request.

The week of January 12th to the 18th is a week that I had set aside for a vacation.

THE COURT: All right. Why don't I give you a date after you get back?

MR. DERSHOWITZ: The 19th or any time thereafter would be fine.

THE COURT: Is the 19th all right with you, Mr. Pedowitz?

MR. PEDOWITZ: That is perfectly fine, your Honor.

THE COURT: This hearing is continued for all purposes until four o'clock on January 19, 1976 in whatever courtroom is assigned to me at that time. And you, Mr. Ostrer, are continued on your bail until that time and place.

Do you understand your obligations under your bail?

THE DEFENDANT: Yes, I understand them, your Honor.

MR. PEDOWITZ: Your Honor, perhaps we can work out one further detail. I know that decisions are quite clear in this circuit about what ought to be done, what tapes are to be put into evidence at trial, namely transcripts that are to be circulated among counsel so that they ultimately come to agree as to precisely whether the transcripts accurately reflect what is on the tapes.

It seems to me it might be helpful here if we can remain in relatively frequent contact so that we can understand what tapes will become relevant in any hearing.

THE COURT: I think my October 8th memorandum is sufficiently clear and I expect all of you to behave in a lawyerly manner about this thing. I am not going to compel the production of transcripts on a non-jury question if the transcripts would be unduly burdensome.

And so I said in my October 8th order that the relevant portions or the parts which will be relied on in

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connection with the motion shall be indexed, segregated and marked and, if possible, transcribed. If it is impractical to transcribe it because of length or cost or delay, then, if it is simply segregated and marked and indexed, the Court will listen to it on a machine.

But, obviously, it would be reasonable, if it can be done, to have transcripts and have them agreed on as to correctness.

All right. The matter is continued for all purposes.

(An adjournment was taken to January 19, 1976 at 4.00 o'clock p.m.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :
v. : 71 Cr. 558 (CLB)
LOUIS OSTRER,
Defendant. :
---------------------------------x

DEFENDANT'S NOTICE OF MOTION FOR FURTHER CONSIDERATION OF DEFENDANT'S MOTION FOR A NEW TRIAL ON GROUNDS OF INCOMPETENCY OF A JUROR, OR, ALTERNATIVELY, OF MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. §2255

PLEASE TAKE NOTICE that the Defendant Louis C. Ostrer, by his undersigned counsel, will move this Honorable Court, the Hon. Charles L. Brieant, United States District Judge, at a time and place convenient to the Court, that the Defendant's earlier filed Motion for a New Trial on grounds of the incompetency of a juror be further considered by the Court in view of the additional facts and circumstances set out in the Affidavits of Junius June Rush, John McNally, and Richard Maline, filed this day, and that this further consideration include the taking of evidence as requested in the Defendant's Motion For Evidentiary Hearing, also filed this day.

The Defendant states that, because there has been no final order from this Court as to the Motion for a New Trial on this ground (filed on or about December 16, 1974), this Motion for Further Consideration is the proper form for this motion, and only if the form is deemed inappropriate by the Court does he seek, in the alternative, that this Motion be treated as one pursuant to 28 U.S.C. §2255.

Respectfully, etc.

alan Dershowitz

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Local Counsel to Louis Ostrer

TO: Lawrence B. Pedowitz, Esquire
Assistant U.S. Attorney
One St. Andrew's Plaza
New York, New York 10017

Dated: April 14, 1977

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA v. LOUIS OSTRER, Defendant.	71 Cr. 558 (CLB) NOTICE OF MOTION FOR EVIDENTIARY HEARING

PLEASE TAKE NOTICE that the Defendant-Movant, by his undersigned counsel, will move this Honorable Court, the Hon. Charles L. Brieant, United States District Judge, to convene an evidentiary hearing on the matters set out as grounds for relief in

> Motion to Vacate Sentence filed this day (Grounds (A),(B),(C),(D) and (E); and

on the matter of juror Geneva Rush, which is the subject of the

> Defendant's Notice of Motion for Further Consideration of Defendant's Motion for a New Trial on Grounds of Incompetency of a Juror, or Alternatively, Motion to Vacate Sentence,

which Motion has also been filed this day.

This application will be made at the United States Courthouse, before Judge Brieant, at the Court's earliest convenience.

Respectfully submitted,

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Assistant U.S. Attorney
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New York, New York 10017

Dated: April 14, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------x

UNITED STATES OF AMERICA : 71 Cr. 558 (CLB)

v.

LOUIS OSTRER,
Defendant.

-----------------------------------x

STATE OF NEW YORK)
: s.s.:
COUNTY OF NEW YORK)

RICHARD J. MALINE, being duly sworn, deposes and says:

1. My name is Richard J. Maline. I am a licensed New York State private investigator, license number 14365. I have been involved in certain investigations relating to the case of UNITED STATES OF AMERICA vs. LOUIS OSTRER at various times, one and off, since February 7, 1977.

2. On or about February 7, 1977, I, along with my co-investigator John McNally, interviewed for the first time one Junius Rush, who described himself as the brother of Geneva Rush, a juror in the Ostrer trial in the so-called Belmont Franchising stock case. I was also present at subsequent meetings with Mr. Rush, including a meeting between Mr. Rush and Harvey A. Silverglate, Esq., counsel for Mr. Ostrer.

Maline affidavit
Page Two

3. Prior to becoming a private investigator, I was with the New York City Police Department for 24 years, and was a detective for 19 of those years.

Richard J. Maline
Richard J. Maline

Sworn to before me
on this 6th day of April,
1977.

Robert E. Kincer

ROBERT E. KINCER
NOTARY PUBLIC, STATE OF NEW YORK
No 31-4316509
Qualified in New York County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------x

UNITED STATES OF AMERICA

v. : 71 Cr. 558 (CLB)

LOUIS OSTRER,
Defendant.

-----------------------------------x

STATE OF NEW YORK)
:s.s.:
COUNTY OF NEW YORK)

JOHN McNALLY, being duly sworn, according to law, deposes and says:

1. My name is John McNally. I am a licensed, New York State private investigator, license No. 15468. I have been involved in certain investigations relating to the case of UNITED STATES OF AMERICA vs. LOUIS OSTRER at various times, on and off, since November 1974.

2. Through my investigations, I learned in early 1976 that Geneva Rush, a juror in Mr. Ostrer's trial in the Belmont Franchising matter, had a brother, Junius, who was a locksmith. I learned nothing more until February of 1977, when I learned that he was associated with Lucerne Hardware Store. From this lead, I was able to locate him, and I met him for the first time on or about February 7, 1977, at which time I interviewed him for the first time. I had subsequent meetings at which I sought additional information each time.

3. I finally was able to arrange a meeting between Junius Rush and Mr. Ostrer's counsel, Harvey A. Silverglate, in New York City on April 6, 1977.

4. I at no time have sought to contact the juror herself, Geneva Rush, either directly or indirectly. I have never asked or requested that the juror's brother, Junius Rush, contact her directly or indirectly. I have, in fact, been instructed not to contact juror Geneva Rush directly or indirectly, and I have obeyed that instruction. I do stand ready and willing, however, to seek out Geneva Rush in the event such action is requested of me under the appropriate authorization.

John McNally

JOHN McNALLY

Sworn to before me this
12th day of April, 1977

Jeraldine Brandon

Notary Public

JERALDINE BRANDON
NOTARY PUBLIC, STATE OF NEW YORK
No. 60-5425000 Westchester County
Certificate filed in New York County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-------------------------------------x
:
UNITED STATES OF AMERICA
: 71 Cr. 558 (CLB)
v.
:
LOUIS OSTRER,
Defendant. :
-------------------------------------x

STATE OF NEW YORK)
: s.s.:
COUNTY OF NEW YORK)

JUNIUS JUNE RUSH, being duly sworn, deposes and says:

1. My name is Junius June Rush. I also use the name June Rusche in my professional work. My address is 243 West 63rd Street, Apt. 18, New York City. I also reside at 3 Washington Village Square, in New York City.

2. My profession is locksmith, electrician and cabinetmaker. I earn approximately $150.00 per day. I am now self-employed, but between 1969 and 1975 I worked at Lucerne Hardware, 201 West 79th Street, New York City.

3. I was in the United States Army for eleven (11) years, until 1969, when I received an honorable discharge with the rank of Master Sargeant. While in the service, I was awarded the Silver Star, Bronze Star and Good Conduct Medal.

Upon my discharge from the Army I lived in Pittsburgh, Pennsylvania for about three months, after which I came to New York, where I have remained ever since.

4. I was born on April 6, 1937, in New Orleans, Louisiana.

5. I am the brother of Geneva Rush, who served as a juror in the case of United States of America vs. Louis Ostrer, and others. My sister Geneva is now about 44 years old and she is living outside of New York. The last time I saw my sister Geneva was sometime in 1975, just before she left New York.

6. When my sister left New York, she was under pressure. She had incurred debts that she was unable to pay, and she was also being pressured by some spiritualists who wanted her to pay them a large amount of money.

7. Around 1970 my sister first got involved with spiritualists. She never gave me too many of the details, but she did tell me that these spiritualists were supposed to show her how to foretell the future, and how to open her eyes and see things. She told me that someday her "eyes would open" and that she would "see the unknown".

8. After she met these spiritualists, her behavior changed. For example, she suddenly refused to allow me to take a drink of liquor in her apartment. She also became very secretive. She told me that people at the place of her employment were "against" her, and she was having trouble with people at work. She also told me that people would try to harm or poison me.

9. My sister Geneva began talking about her friend "Bertha" around 1970. Shortly thereafter, I was introduced to Bertha at Geneva's house. The next time I met Bertha was about one year later at which time Bertha introduced me to her husband Olive. This meeting took place at my sister's apartment during the time that my sister was sitting as a juror in the Ostrer trial. At this meeting, we all discussed the ongoing trial. My sister stated that "the Italian" has a lot of money, and that "the Jew" has a lot of money, and they must be guilty. Bertha also stated that they were guilty. Geneva then said something like "I saw something in my eyes to indicate they are guilty." I have heard Geneva use the phrase "see with my eyes", or "eyes opening" many times before, at which times she was discussing her spiritualism. Geneva thought that she had mystical powers with which she was able to see,

know, and understand things that other people could not. She states at this meeting that she knew that the defendants were guilty. At one point she referred to the defendants as the "Italian mobster and the rich Jew in cahoots with him". Bertha expressed agreement with Geneva and said that Geneva had better not vote in their behalf. Geneva told me on that occasion that she talked with another member of the jury during the course of the trial.

10. I have spoken to my sister from time to time since she left New York. I spoke to her as recently as yesterday, Tuesday, April 5, 1977, on the telephone. She said that she is sorry that she made a mistake and voted "guilty" in the case, and she asked me if I thought she should return to New York "to straighten this mess out".

11. On several occasions from 1970 until she left New York in 1975, my sister claimed that she had special powers that enabled her, for example, to foretell the future.

12. From 1970 on, my sister Geneva spoke to me on many occasions about Bertha, and she indicated that she had great confidence in Bertha and placed great reliance on Bertha's advice.

James J. Rush

Sworn to before me this
6th day of April, 1977

Geraldine Brandon.

NOTARY PUBLIC, [illegible]
No. 60 5425000 Westchester County
Certificate filed in New York County
Comm[illegible]

UNITED STATES OF AMERICA :

-v- : AFFIDAVIT

LOUIS OSTRER, : 71 Cr. 558 (CLB)
71 Civ. 1805 (CLB)

Defendant. :

- -x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

JUNIUS JUNE RUSH, being duly sworn, deposes and says:

1. I reside at 243 West 63rd Street, New York, New York. I am the brother of Geneva Rush.

2. Several years ago my sister informed me that she was serving as a juror in a criminal trial. I recall that during the trial I was with my sister and a friend of hers named Bertha and the trial was discussed. My sister did not state that the defendant was guilty. The entire conversation about the trial lasted for about two minutes.

3. My sister never stated in my presence during the time she was a juror that she believed the defendants were guilty. My sister never referred to the defendants as the "Italian Mobster and the rich Jew" or anything similar to that. I never knew while my sister was serving as a juror that any of the defendants were Jewish.

4. At no time since the trial has my sister told me in any way that she believed she made a mistake by voting guilty, but she has asked me if I thought she made a mistake.

Junius Rush
JUNIUS JUNE RUSH

Sworn before me this

2nd day of May, 1977

Mary L. Avent
Notary Public

MARY L AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA : Case No.

v. : [71 Cr. 558-CLB]

LOUIS OSTRER, :

Defendant. :

---x

MOTION TO VACATE SENTENCE

1. Louis C. Ostrer, the movant herein, was convicted by a jury in the United States District Court for the Southern District of New York (Edelstein, Ch. J.).

2. The judgment of conviction was entered on January 26, 1973.

3. The movant was sentenced as follows on his conviction on various counts of Indictment No. 71-558:

a. Count 1: 3 years and a fine of $10,000.
b. Count 9: 3 years and a fine of $5,000.
c. Count 16: 2 years and a fine of $10,000.
d. Count 17: 2 years and a fine of $10,000.
e. Count 18: 2 years and a fine of $10,000.
f. Count 19: 2 years and a fine of $10,000.
g. Count 31: 3 years

h. Count 33: 3 years.

i. Count 34: 3 years.

j. Count 35: 3 years.

k. Count 36: 5 years, and execution of sentence suspended, defendant placed on probation for one day.

With the exception of the sentence on Count 36, the Court ordered that the other terms were to run concurrently.

4. The prosecution involved a complicated stock fraud scheme violating the federal securities laws (15 U.S.C. §§ 77q(a), 77x, 78j(b) and 78ff), Rule 10b-5 of the Securities and Exchange Commission (17 CFR 240. 10b-5), and federal mail fraud statute (18 U.S.C. §§1341), and conspiracy (18 U.S.C. §371).

5. Ostrer pled not guilty to all charges.

6. Although Ostrer sought to waive his right to a jury trial, his co-defendant would not consent to such a waiver. The Court having denied Ostrer's motion for a severance, he stood trial before a jury.

7. Ostrer did not testify at trial.

8. The conviction and the Court's denial of a new trial motion on grounds of incompetency on the part of a juror were appealed.

9. The conviction and denial of the new trial motion were affirmed on appeal sub nom. United States v. Dioguardi,

22C

492 F.2d 70 (2d Cir.), cert. denied, 419 U.S. 829 (1974)

10. The conviction has been subject to additional federal litigation in the United States District Court for the Southern District of New York.

11(a). On or about December 16, 1974, Ostrer brought a second motion for a new trial alleging that the juror Geneva Rush was incompetent to serve for reasons of mental disturbance and that she was a "patient-attendant" (that is, a psychiatric patient with attendant duties) and further alleging that the conviction was tainted by both Fourth and Sixth Amendment violations resulting from the defendant's being the subject of illegal electronic surveillance prior to and during the course of his federal trial. The Court conducted an evidentiary hearing on March 1,3, and 4, 1976, and denied the motion in an opinion now reported at 422 F.Supp. 93 (1976). (That motion for a new trial also gave rise to litigation concerning Ostrer's being continued on bail during the course of his seeking appellate review of the denial of his new trial motion; the opinion of the District Court is reported at 422 F.Supp. 108 [November 3, 1976], and the appeal [Court of Appeals Docket No. 76-1542] of that refusal to continue Ostrer on bail was on April 13, 1977, dismissed as moot. The Court of Appeals had stayed Ostrer's surrender pending its consideration of the appeal. Ostrer is currently at large, although his surrender has been noticed for April 15, 1977.)

(b) On or about December 1, 1976, Ostrer filed a motion with the United States District Court for the Southern District of New York seeking the re-opening of the March 1976 evidentiary hearing concerning the nature and scope of the transmittal of information derived from the illegal electronic surveillance from state to federal authorities. The motion to re-open that hearing (styled alternatively as one brought pursuant to 28 U.S.C. 2255) was brought upon discovery of evidence of significantly more extensive state-federal cooperation than had previously been known by the defense, that information having been provided by a former United States Strike Force Attorney in the Eastern District of New York. No evidentiary hearing has yet been held.

(c) The District Court opinion denying Ostrer's second new trial motion (a), _supra_, was affirmed in all respects by a brief unreported _per curiam_ decision of the Court of Appeals (No. 76-1282, October 28, 1976). On March 28, 1977, the United States Supreme Court denied Ostrer's petition for a writ of certiorari.

12. Ostrer now moves that his sentence and conviction be vacated on the following grounds:

(A) GROUND ONE (Pre-Sentence Report): On April 12, 1973, at the time of sentencing, Ostrer's counsel inquired of the Court whether he might examine the pre-sentence report. (See pages 2-3 of the transcript of those proceedings, a copy of which pages are appended to this Motion as Appendix A.)

The Court stated that it had earlier informed counsel that such an application would be considered only upon formal papers, which counsel for Ostrer had not filed. The Court then ruled "In any event, that Motion is denied." Later during the course of the sentencing hearing, the Court stated, inter alia:

> "I have refused to disclose the pre-sentence report because in the exercise of my discretion I see no reason to violate the sanctity and confidentiality of that report
>
> "I don't think that the mandate of Rule 32(c) of the Federal Rules of Criminal Procedure, or the many decisions which have been handed down indicate any obligation on the part of a Court to disclose [illegible] contents of a pre-sentence report. Yet there is no doubt that the subject has had a great deal of discussion and it has been suggested by scholars and even in some decisions that the better part of practice would to disclose [sic] those portions of a report which would have any bearing or influence upon a Court's decision as to sentence and to give counsel and the defendant an opportunity to rebut, to discuss and indicate that perhaps there were errors, and errors, of course, do creep into pre-sentence reports, but that is not the situation here at all." Id. at 17-18 (emphasis added).

The Court stated further that, in considering the pre-sentence report, it had "dwelt on two areas only" -- the defendant's good family life and his charitable propensities, and his conviction. The Court disavowed any consideration of "any characterization or anything which is other than objective." The Court stated that "if there were contained in this pre-sentence report matters which were unsupported and which are entirely ex parte, which would in any way influence my sentence, I would have no hesitation in revealing that portion of the report." Id. at 16-17

The Court proceeded to sentence the defendant to a three-year term of imprisonment and a $55,000. fine.

The Memorandum on Behalf of the United States in Connection with Sentencing filed March 13, 1973, makes the claim that "according to to the Government's information" -- information which is nowhere set out in that Memorandum -- Ostrer "is by no means a minor organized crime figure."

Ostrer denies that he is an "organized crime figure." He denies that any of his business dealings with persons the Government claims are "notorious" and/or "well-known" are criminal or otherwise illegal.

The sentencing court was required, under these circumstances, to make the pre-sentence report available to Ostrer's counsel prior to the imposition of sentence so that the defense would have a reasonable opportunity to examine and rebut any such "information" and/or allegations (or any other allegations of untoward conduct or associations) which could have influenced the Court's sentencing decision. There is a substantial likelihood that the sentence imposed is based upon entirely false information and/or false assumptions concerning Ostrer's actual circumstances, business dealings, and "organized crime" connections and status.

12(B) GROUND TWO (Ex Parte Discussions): Ostrer further moves that his sentence be vacated for the reason that the sentence was influenced further by ex parte communications to the Court by government witness Michael Hellerman and other members of the prosecution to the effect that Hellerman had great fear for his personal safety as a result of his testifying in the case, the content of which communications were not disclosed to the defense prior to the imposition of sentence.

Ostrer denies that there is any basis whatsoever for any allegation or innuendo that he might at any time have made any effort or threat to cause any physical harm to Hellerman and/or any other member of the prosecution team. There is a substantial likelihood that Ostrer's sentence was enhanced by reason of the Court's being informed that the defendant might be expected to engage in such an attempt to harm or even kill Hellerman. Neither Ostrer nor his counsel were ever informed that such allegations had been conveyed to the sentencing judge. This was just recently learned by Ostrer and his counsel.

12(C) GROUND THREE (Witness' Perjury and Government's Brady Obligations): As is more fully set out in the accompanying Affidavit of Harvey A. Silverglate, filed this day, the Government failed to disclose to the defense certain information, exculpatory to the defendant Ostrer, concerning Government dealings with the witness Michael Hellerman, which information, if it had been disclosed and developed during the course of trial, would have significantly undermined the testimony of that crucial prosecution witness. When the witness Hellerman failed to disclose this information during the course of his cross-examination concerning any promises or inducements, etc., the Government failed to correct this false and misleading testimony. That non-disclosed information -- all of which goes directly to the witness Hellerman's credibility and his motives in testifying in a manner pleasing to the prosecution -- includes the facts that a) the Government had promised and arranged favorable conditions of "confinement" for Hellerman; b) the Government had agreed to and facilitated Hellerman's trip to Europe during the time Hellerman was under indictment and had so agreed with knowledge that Hellerman would be transporting a considerable amount of illicitly obtained monies from the United States to be deposited in Switzerland; c) the Government agreed to or, at the very least, acquiesced in, or did not oppose (and may have even suggested) Hellerman's motion to reduce his sentence of imprisonment and further agreed to a reduction in the amount of restitution which Hellerman would be obligated to pay to his swindled victims; d) the Government made arrangements to have Hellerman's legal fees substantially reduced; and e) the Government provided Hellerman with monies in the amount of at least $800./month during the course of this and other prosecutions.

12(D) GROUND FOUR (Sec. 3500 Material): As is more fully set out in the accompanying Affidavit of Harvey A. Silverglate, filed this day, the Government failed to turn over to the defense various statements (within the meaning of 18 U.S.C. §3500) of the witness Hellerman which were within the possession of the United States Attorney's Office or which should, with due diligence, have been within that office's possession or which were deliberately or recklessly -- and, probably in bad faith -- not preserved, recorded, or transmitted in a manner such that they would be available to Ostrer's defense counsel at trial. These statements include all records of Hellerman's extensive discussions and de-briefing sessions with the then Chief of the Criminal Division of the United States Attoney's Office Robert Morvillo and, further, any documents incorporating any of these statements which were transmitted from Mr. Morvillo and his staff to any other members of the prosecution of this or any other case in which Hellerman is or was involved.

12(E) GROUND FIVE (Inherent Unreliability of Chief Government Witness): As is more fully set forth in the accompanying affidavits of Harvey A. Silverglate, Maurice Edelbaum, Martin Roth, Anthony Soldano and Anthony DiLorenzo, the testimony of Michael Hellerman, who was the chief Government witness against movant Ostrer and whose testimony has been found by a Judge of this Court to have been believed by the jury and hence responsible for Ostrer's conviction (*see*

United States v. Ostrer, 422 F.Supp. 93, 106 [SDNY, 1976] ["The proof against Ostrer was substantial, if the jury found the testimony of Hellerman credible, as indeed it must have done in order to have returned these guilty verdicts".]) (emphasis added), was so thoroughly perjured, and Hellerman's character and credibility so flawed, to some limited degree made known to the jury but to a large extent not made known to the jury, so that Ostrer's conviction, based as it was primiarily, if not almost entirely on Hellerman's testimony, cannot stand. Ostrer's conviction under such circumstances is a violation of his right to Due Process of Law.

Hellerman was the only Government witness who linked Ostrer to the Belmont stock manipulation scheme as a criminally culpable participant rather than as a victim of the manipulation. His testimony was essential to Ostrer's conviction.

It was only after the trial, and indeed quite recently, that Ostrer and his counsel have learned that Hellerman's lies, his perjuries, and his criminal activities were far more extensive than the jury was allowed to learn.

13. The Ground alleged in 12(A), supra, is based upon the Court of Appeals' recent rulings in United States v. Robin, 545 F.2d 775 (1976) and in United States v. Stein, 544 F.2d 96 (1976) and further upon the United States Supreme Court decision in Gardner v. Florida, __U.S.__45 U.S.L.W. 4275 (March 22, 1977), all of which contain various rulings con-

cerning the requirement that a criminal defendant be afforded certain procedural protections at the time of imposition of sentence including, *inter alia*, making available to the defense certain materials which the court considers in imposing sentence and giving the defense a reasonable opportunity to challenge any contested factual allegations in those materials.

The Grounds alleged in 12(B),(C) and (D), *supra*, are based upon newly discovered evidence, *i.e.*, various admissions and statements of the Government's main witness at trial as set out in the text of the uncorrected galleys of a book, *Wall Street Swindler*, by Michael Hellerman (with the assistance of Thomas C. Renner), which is scheduled to be published by Doubleday and Company in May of this year.

The Grounds alleged in 12(E) are based upon newly discovered evidence, unavailable at the time of trial, as set out in the affidavits of Maurice Edelbaum, Esq., Martin Roth, Esq., Anthony Soldano, and Anthony DiLorenzo, filed this day, and as further set out in the Affidavit of Harvey A. Silverglate relating certain portions of the text of *Wall Street Swindler*.

14. Ostrer's counsel currently has pending in this Court the motion described, *supra*, at 11(b).

Further, his counsel are currently considering whether to file a petition for rehearing with regard to the United States Supreme Court's denial of his petition for certiorari, described *supra* at 11(c)

15. Ostrer was represented

(a) at trial and sentencing by Maurice Edelbaum, Esq., 230 Park Avenue, New York, New York;

(b) on appeal to the Court of Appeals by Orans, Elsen & Polstein, 1 Rockefeller Plaza, New York, New York (Of Counsel: Sheldon H. Elsen, Lewis Shapiro, and Anthony J. Ferrara; and Henry J. Boitel, 233 Broadway, New York, New York)

(c) on petition for certiorari by Alan M. Dershowitz, Esq., Faculty Office Building, Harvard Law School Cambridge, Ma.,

(d) on his motion for a new trial, filed December 16, 1974, and at all subsequent proceedings by the undersigned counsel.

[16. Not applicable]

[17. Not applicable]

Wherefore, Louis C. Ostrer prays:

1. That the United States be required to appear and answer the allegations of the movant.

2. That this Court vacate the conviction and sentence imposed upon the movant.

3. That the Court grant such other, further, and different relief as to the Court may seem just under the circumstances.

Respectfully submitted,

Alan Dershowitz
Faculty Office Building
Harvard Law School
Cambridge, MA. 02138
(617) 495-4617
Counsel for Louis Ostrer

Harvey A Silverglate

Harvey A. Silverglate
Ann Lambert Greenblatt
217 Lewis Wharf
Boston, MA. 02110
(617) 723-2624
Co-counsel for Louis Ostrer

Richard Wynn
Wynn & Atlas
230 Park Avenue
New York, New York 10017
(212) 679-9429
Local Counsel for Louis Ostrer

Dated: April 14, 1977

VERIFICATION

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LOUIS OSTRER, being duly sworn according to law, deposes and says:

I am Louis Ostrer, the movant in the matter of United States v. Louis Ostrer. I have read the attached Motion to Vacate Sentence, and all of the allegations and statements therein are either true to my knowledge or believed by me to be true.

Louis Ostrer

Signed and sworn to before me
on this 13th day of April, 1977.

Jeraldi Brandon
Notary Public

JERALDINE BRANDON
NOTARY PUBLIC, STATE OF NEW YORK
No. 60 5425000 Westchester County
Certificate filed in New York County
Commission Expires March 30, 1978

APPENDIX "A" TO

MOTION TO VACATE SENTENCE

SENTENCING TRANSCRIPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-------------------------------- X
:
UNITED STATES OF AMIRICA :
:
vs. :
:
ANTHONY SOLDANO, et al., : 71 Cr. 558
:
DEFENDANTS :
:
:
--------------------------------X

Before:

Hon. David N. Edelstein,
District Judge

New York, N. Y. ,
April 12, 1973 - 10:30 a.m.

APPEARANCES:

Whitney North Seymour, Jr., Esq.
United States Attorney
For the Government
By: Harold Mc Guire, AUSA
Assistant United States Attorney

Jay Goldberg,Esq. and
Edward Panzer, Esq.
Attorneys for Defendant Dioguardi

Maurice Edelbaum, Esq.
Attorney for Defendant Ostrer

(Case Called)

MR. MC GUIRE: Government is ready.

MR. EDELBAUM: Ready.

THE COURT: The first order of business is to dispose of the motion for a new trial made on behalf of Mr. Dioguardi and joined in by Mr. Ostrer for a new trial pursuant to Federal Rules of Civil Practice, Rule 33. That motion is denied in all respects. A detailed discussion and analysis of the issues raised will be contained in an opinion by the court to be filed in due course.

We are ready, and this court is now prepared to proceed to sentence.

MR. EDELBAUM: May I inquire, your Honor, if your Honor will permit counsel to examine the probation report?

THE COURT: That application has been made pursuant to a telephone conversation and I think that the instruction that was conveyed to you was that I would only consider such an application upon formal papers.

MR. EDELBAUM: I never made that application.

THE COURT: In any event, that motion is denied.

Mr. Goldberg, would you and Mr. Dioguardi please step forward.

MR. GOLDBERG: Yes your Honor.

THE COURT: I think one other item of business should be dealt with. I have here an affidavit which the Court will have marked for identification and sealed.

(Marked Court exhibit A for identification)

MR. GOLDBERG: May I look at that, your Honor? I have no idea what that is.

(Pause.)

MR. GOLDBERG: Oh, yes.

MR. MC GUIRE: If the Court please, is that affidavit something that the Government should be allowed to look at?

THE COURT: You may.

(Pause.)

MR. MC GUIRE: Very well. Of course we have seen that, your Honor.

MR. GOLDBERG: The defendant is ready for sentance if your Honor wishes and I will speak first, if your Honor doesn't mind.

I am a bit overawed when I stand here trying to tell your Honor of the various criteria that you ought to consider in imposing sentence because of your long experience and your statements concerning the sentencing function, and I cannot enlighten this Court by anything that I can say. In 22 years I am sure they have equipped your Honor with full experience to render a fair judgement as to imposition of sentence.

But when I sit and think about what I would do, because sometimes lawyers do that when they think about the fate that may befall their clients, I guess it is very difficult to discard all the material that we have received about this defendant.

To be sure, so many jurors have heard of his name, and his name has attracted a great deal of publicity, and I guess the commonplace sentence would be one that would impose an extended period of incarceration on this defendant because of a jury finding of guilt. That is, of course, the first sentence that comes to mind, one that would impose a lengthy period of incarceration on this defendant. There are no two ways about it, and I am not standing here to re-argue matters that I presented to a trial jury about the question of guilty or innocence.

Of course your Honor does have to consider sentences that were imposed in other cases arising out of this crime on other defendants, the disparity in sentences being something that scholars and judges have talked about, and it is something to be considered, and your Honor knows, and I'm quite sure the sentences that were imposed by Judge Knapp and yourself most respectfully, your Honor knows of them, and I say to your Honor that those acts occurred before the defendant was incarcerated.

The defendant entered the Federal Prison in, I believe, September or October of 1970. Since that time there has been a steady decline in his health.

I submitted to the Court a medical report dated as late as March 7, 1973 by Dr. Wexler which I hope that your Honor has seen.

THE COURT: I have.

MR. GOLDBERG: It indicates that with

the conditions that this defendant suffers from, his life expectancy is rather short, and far less than the statistical normal for an ordinary person in society.

You could - and I don't think any Court would fault you if you sent him away for an extended period of time. I doubt that any Court would be sympathetic to his plea that he was incarcerated for too long, but I ask your Honor to fashion a kind of sentence that doesn't turn into a life sentence for this defendant.

This defendant has still close to a year to serve on his present sentence. He has been in for well over two and a half years, and I would think that knowing that this defendant has a short life span, so the doctors tell us, it might take a bit of - I don't want to call it courage but I know your Honor has all those qualities - but it might be the unique method of sentencing to impose a period of sentence and put the defendant on probation knowing that he would be under the thumb, so to speak, of a no-nonsense judge, that were he to violate or stray one bit from the right line he would find himself incarcerated for what would amount to the rest of his life by reason of the sentence that this Court could impose.

I ask your Honor to recognize that these acts took place before the sentence, give consideration to his health, and take a chance, while I am quite sure very few courts would take such a chance, but take a chance, your Honor, on this defendant, and put him under the kind of sentence that would mandate that this would be his last time to have an opportunity as as to comply with his obligations as a citizen and should he falter, he would have to answer to the Court. If he doesn't falter, then the faith that I have in him would be justified. If he does falter he would be before your Honor and he would know that there would be no turning back in terms of the kind of sentence that you could impose and in view of his life expectancy what would amount to in effect, as I said before, a life sentence.

I ask your Honor then to be as lenient as possible under the circumstances.

THE COURT: Mr. Dioguardi, before this

Court imposes sentence upon you do you wish to say anything in your own behalf and in mitigation of sentence.

MR. DIOGUARDI: No sir, your Honor.

THE COURT: Sentencing day for a judge is probably the loneliest time in his life. Every judge is seriously concerned with the question of disparity. I am afraid, however, that use of that term can be somewhat misleading. There will always be differences between sentences of different individuals who, it would appear, had been convicted of similar crimes, but as you well know, a judge, in considering sentence, must sentence the individual and must take into consideration all the factors that are available, and they must be weighed carefully.

I have done so in your case, Mr. Dioguardi. I have not only searched your record carefully but I have searched my conscience, and I have thought long and hard about what sentence to impose upon you.

I have not been influenced in any way by any publicity concerning your alleged notoriety.

I have considered your record objectively. I think there can be no question or doubt that you have an extensive criminal record extending over a long period of time. I have tried very hard to find one possible fact in your favor, and I say with deep regret that I have not been able to do so.

One of the very significant considerations that a judge must consider in sentencing a defendant is the needs of society as well as the needs of the defendant. I don't want to be pedantic, and certainly it is not my function to sermonize, but you have dedicated your life to a career of crime, and you have devoted yourself to a life style of lawlessness. You have preyed upon society, and you have suffered the consequences from time to time, but unfortunately, you have not been deterred from a continuation of your repeated violations of the law. Now those are facts. Those are facts that we cannot, must not overlook.

I don't think it can be denied that you are a suitable candidate for rehabilitation. You have not been deterred. Seriously, what is left for a Court in such a case?

The inescapable conclusion, I think, necessarily dictates a sentence of some significance.

My sentence is as follows.

On count 1, 5 years and $10,000.

On count 16, 2 years and $10,000.

On count 17, 2 years and $10,000.

These sentences are to be served consecutively upon the completion of your present term.

On count 31, 5 years and $1,000.. Execution of sentence suspended. Five years probation.

THE COURT: Mr. Ostrer and Mr. Edelbaum, will you please step forward.

MR. MC GUIRE: If the Court please, before sentence is imposed on Mr. Ostrer, might we have a short recess?

THE COURT: Very well.

(Recess)

MR. MC GUIRE: If the Court please, on the subject of Mr. Dioguardi's sentence, could we inquire whether thefines that your Honor has imposed are to be committed fines?

THE COURT: They are.

MR. MC GUIRE: And as to the sentence on Count 31, your Honor imposed five years and a thousand dollar fine, and suspended execution of the sentence.

I take it, sir, that that is to mean execution of the jailterm is suspended.

THE COURT: As well as the fine.

MR. MC GUIRE: The execution of the fine is also to be suspended?

THE COURT: That is correct.

MR. MC GUIRE: Thank you, your Honor.

THE COURT: Step forward, Mr. Edelbaum, and Mr. Ostrer.

MR. EDELBAUM: Yes, your Honor.

Your Honor, just as you said earlier today, the loneliest time in the life of a judge is the day that he is required to impose sentence on a defendant, the most difficult time that any lawyer has is the day that he appears on sentence for a client, particularly when over the last number of years I have gotten to know the defendant, his family, his wife and his sons.

I know, your Honor, that our Probation Department, from my experience in this Court, is probably one of the best there is, so that you probably know as much about my client as I do by this time.

I'm sure you know, and I know that you have received letters from various members of his family. I know that you received letters from three boys that, in my opinion, are outstanding boys.

Much of the reason why they are so outstanding, judge, is because of the close family life, because of their father, their respect for their father, because of the great family life that they have.

I predict that these three boys will make careers in the different professions that they intend to go into.

Your Honor, I will not discuss the

facts because a jury has spoken and that is not something I discuss on sentence. I don't think there would be any question that Mr. Ostrer lost about $123,000 in these transactions with Hellerman.

He has made considerable restitution to some of the friends of his that he had gone with into this proposition, honestly believing that he and they would make money.

Three years ago he pleaded guilty, as you well know from your probation report, in the State Court involving a larceny.

Judge Riccobono at the time of imposing sentence had the confidence in this man that he could be rehabilitated and that because of his outstanding ability he could pay back an enormous amount of money. He didn't violate that confidence. The judge - he has kept his faith with the judge, I am sure your Honor knows, because of a report from the Probation Department of the Supreme Court of the State of New York telling your Honor the type of probationer this man has been. He has paid back a lot of money, and if he is permitted to be at liberty, he will pay back a lot more money.

Your Honor, he has been charitable in his lifetime. You have gotten letters about his activities.

I ask your Honor to find it in your heart not to put this man in jail. I don't think anybody could have suffered more than he has suffered during this entire episode, and during the trial, and not only has he suffered but I have seen what it has done to his wife and his family.

I know, I say to your Honor that from the entire picture that you had at this trial, this was not a defendant who originated this deal. This was not a defendant who conceived the idea of what was going to happen here. You know the picture from the facts. I know your Honor a long time. I had the privilege to appear before you the very first week or month that you became a judge of this Court. I know that you are a kind man. I know that from experience.

All I ask you to do is to find it in your heart to put this man on probation, to give him an opportunity to show that he can be a good citizen. He has fantastic ability, judge, in what he is doing, fantastic earning power, and he is just in the midst of concluding excellent legitimate situations.

So I leave him in your hands, your Honor, knowing that you are going to do what is right in this case, and I don't think there is any need to make impassioned pleas. Your Honor knows as much about this man as I do. You know what he's done with his family, with his mother, with his father, with his sister, with his wife and with his sons who are all attending college.

The impact of putting him in prison will destroy the boys because they won't be able to finish what they were about to complete because the funds will not be there.

In closing, your Honor, I will leave him in your hands knowing that you will do what your heart tells you should be done in this case on all the facts that have been disclosed to you from the excellent Probation Department that we have.

Thank you.

THE COURT: You are quite right, Mr. Edelbaum, about your comments concerning the excellence of our Probation Department. They have done a very thorough and complete job in connection with Mr. Ostrer. And they have depicted him as a good family man. They have depicted his educational background. They have, of course, included in their pre-sentence report his previous conviction, and I don't think that's in dispute nor can it be doubted. He pleaded guilty and sentence was imposed by Judge Riccobono. Nor is there any question that during his period of probation thus far that he has been a good probationer.

In my consideration of the facts set forth in this pre-sentence report I have dwelt on two areas only: one, the narration and discussion of his good family life, his charitable propensities which have been supported by many, many letters, not merely from his family but from others members of his community of all faiths, may I say.

The other factor that I have considered, which of course is an unfavorable factor, is that of his conviction. He was convicted of a felony.

Those are the two sets or categories of information which I have dwelt upon. I have not in any way considered any characterization, or anything which is other than objective.

I have refused to disclose the pre-sentence report because in the exercise of my own discretion I see no reason to violate the sanctity and confidentiality of that report.

I will say this, however, that if there were contained in this pre-sentence report matters which were unsupported and which were entirely ex parte, which would in any way influence my sentence, I would have no hesitation in revealing that portion of the report. I don't think that the mandate of Rule 32 (C) of the Federal Rules of Criminal Procedure, or the many decisions which have been handed down indicate any obligation on the part of a Court to disclose the contents of a pre-sentence report. Yet there is no doubt that the subject has had a great deal of discussion and it has been suggested by scholars and even in some decisions that the better part of practice would to disclose those portions of a report which would have any bearing or influence upon a Court's decision as to sentence and to give counsel and the defendant an opportunity to rebut, to discuss and indicate that perhaps there were errors, and errors, of course, do creep into pre-sentence reports, but that is not the situation here at all.

MR. EDELBAUM: Thank you, your Honor.

THE COURT: Mr. Ostrer, before this Court imposes sentence upon you do you wish to say anything on your own behalf in mitigation of sentence.

MR. OSTRER: Yes, your Honor. There is very little that I can add to what Mr. Edelbaum has said other than the fact that I feel that if your Honor will give me the chance to prove to you that I can fully rehabilitate myself, and not get involved in any situation that would be detrimental to my liberty, or to your Honor's good judgement, I'm sure that I will not embarrass that opinion. I promised that to Justice Riccobono three years ago. He hasen't been sorry. And I can assure you that if you saw fit to permit me to walk out of this court room, regardless of how long the probation period would be, I'm ready to accept it, to be under the jurisdiction of any agency, to prove that I don't belong in jail.

I'm not questioning the decision of the jury. They found me guilty, and so under the American process I must accept it. But I tell you as you well know that I was victimized. The people who put the money up for me have been substantially paid. It is my intention to continue to repay them. I have been making restitution payments all through the period of indictment and trial to the Supreme Court of New York State.

I just want another chance. That's all I ask of you. If you give it to me I'm sure that you will not be sorry. I'm ready to accept any contingency for such leniency that your Honor feels should be imposed. That is what I beg of you. If you see it within you to give me this chance. I have nothing else to say to you.

THE COURT: Mr. Edelbaum, Mr. Ostrer

was convicted before Judge Riccobono in what year?

MR. EDELBAUM: Three years ago.

THE COURT: Do you recall the exact date?

MR. EDELBAUM: No, I don't, your Honor.

MR. MC GUIRE: June of 1969, if my memory serves me correctly.

MR. EDELBAUM: I think that is correct.

MR. MC GUIRE: The offenses that were the subject of this trial took place during the early part of 1970.

MR. EDELBAUM: He was placed on probation in November '69, your Honor.

THE COURT: Well, so you can understand, the sequence of events here troubles me considerably.

In '69 Mr. Ostrer was given a lenient sentence.-

MR. EDELBAUM: November of '69.

THE COURT: - for a serious crime, a felony.

Then what occurred gentlemen? He committed another crime as the jury found.

MR. EDELBAUM: Yes, your Honor.

THE COURT: I think that cuts very heavily against the argument of his successful probation and his suitability for rehabilitation. Also, I don't by any means wish to indicate that he's hopeless. He certainly has many factors in his favor. His family, his father, his mother, both aged, his wife, necessarily have played a very considerable part in my thinking, but when all is said and done, the most objective factor for consideration here is that subsequently, after he was convicted of a crime, he became involved in a sequence of events which became the subject of an indictment and the subject of a conviction before this Court.

Now those aren't easy problems to dismiss.

MR. EDELBAUM: I realize that, and I know that I cannot go into facts and that I must remain silent, but I would say, your Honor, that those people who directly suffered losses as a result of Mr. Ostrer's activities and his alleged part in this conspiracy are being paid who will and and had been been made whole before he was convicted, which shows the type of man this was, that there was no intent to deprive them of their money.

MR. MC GUIRE: May I, your Honor?

I can't let that statement by Mr. Edelbaum go entirely without refutation.

The Government's information on the subject of Mr. Ostrer's restitution to those who helped him with this scheme is that very little restitution was made before he was indicted in this case, which was some time after the events took place, and that it may be that since the indictment, some effort has been made.

THE COURT: Well, I am going to ignore that, Mr. McGuire, because if I were to give your statement any serious consideration in rebuttal of Mr. Edelbaum's situation we would have to have a collateral hearing, and I just don't think it is that significant.

After considering all of the positive as well as the negative factorswhich I have just stated, my sentence is as follows.

On Count 1,3 years and $10,000.

On Count 9, 3 years and $5,000.

On Count 16, 2 years and $10,000.

On Count 17, 2 years and $10,000.

On Count 18, 2 years and $10,000.

On Count 19, 2 years and $10,000.

On Count 31, 3 years. And no fine.

On Count 33, 3 years and no fine.

On Count 34, 3 years and no fine.

On Count 35, 3 years and no fine.

On Count 36, 5 years, and execution of sentence suspended, probation one day.

On all of the other Counts upon which sentence has been imposed they are to run concurrently.

MR. EDELBAUM: Your Honor, would you entertain an application for bail pending appeal? I don't think it can be said that in view of everything that has happened that an appeal in this case would be frivolous. I think that the Government could never contend that here.

And on the question of an appeal risk, your Honor, he is presently under bail of $250,000 as a material witness, and he hasen't been called before a Grand Jury, and if your Honor made the bail a dollar he would appear. He has every family, every incentive to try and set this conviction aside, so there is no possibility of him ever running away, your Honor.

In all my 45 years at the bar I have never had a defendant default in appearing in any case in which he gave bond, and knowing Mr. Ostrer, and knowing his propensity to appear whenever he is called upon anywhere in connection with any matter involving others here or in the State Court, there is no possibility. He is out on a $10,000 Personal Recognizance Bond. I am sure If your Honor fixed that there would be no problem with him ever appearing to answer this thing.

MR. MC GUIRE: If I may, your Honor, the Court has imposed sentences involving fines totaling $55,000, and the Government would think it appropriate that the Court set bail in the amount of $55,000 pending appeal, and that Mr. Ostrer be released on that amount of bail on the condition that the appeal be prepared promptly.

MR. EDELBAUM: We will prepare the appeal promptly, of course. But may I point out, your Honor, that $55,000 bail would cost him $2,500 which could very well be used in making restitution on the other matter. He works around the clock. Judge, I never saw a man work the way this man works to try and make full restitution, which he has done, so, Judge, bail is given for the purpose of assuring a defendant's appearance. You must weigh all the factors, and I think that if he gave his Personal Recognizance Bond, in any amount that your Honor would fix, that that would be more than adequate to assure his appearance.

THE COURT: The Court will accept a Personal Recognizance Bond of $25,000.

MR. EDELBAUM: Thank you. And may we have until tomorrow to do that, your Honor?

THE COURT: Yes, you may, and I would expect you to proceed with your appeal promptly, and at this point I should say to Mr. Dioguardi and to Mr. Ostrer that you have an absolute right of appeal, and that you have a right to have the Court appoint counsel in the event you are unable to afford to retain counsel because you are impecunious.

MR. EDELBAUM: Thank you, your Honor.

THE COURT: And these fines are committed.

MR. EDELBAUM: Thank you, your Honor.

MR. GOLDBERG: Your Honor, may I speak to Mr. Edelbaum for a minute?

THE COURT: Surely.

MR. EDELBAUM: Your Honor, the motion that was made for a new trial which your Honor denied today, and your Honor indicated you were going to file a memorandum --

THE COURT: A detailed memorandum.

MR. EDELBAUM: Yes. May we have it denied as of today so that the record will show that so that we can properly file a notice of appeal?

THE COURT: It is denied as of today and the papers will be so enforced.

MR. EDELBAUM: Thank you very much.

THE COURT: Until what time tomorrow on the appeal?

MR. EDELBAUM: Four o'clock, your Honor.

THE COURT: Four o'clock.

(Sentence concluded)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

v.

LOUIS OSTRER,

Defendant.

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71 Cr. 558 (CLB)

NOTICE OF MOTION TO PRODUCE CERTAIN COURT ORDERS AND RELATED PAPERS

PLEASE TAKE NOTICE that the Defendant-Movant, by his undersigned counsel, will make an application to the Court, the Hon. Charles L. Brieant, United States District Judge, for an order that the orders of the Court, the Hon. Morris E. Lasker, entered in 70 Cr. 967 (United States v. Michael Hellerman, et al.) which were on August 8, 1976 ordered sealed and placed in the vault in Room 602, be produced and made available to Ostrer's counsel.

In the alternative, counsel will move that the Court order that those orders under seal in 70 Cr. 967 be made available to the Court for *in camera* inspection to determine whether those orders contain any papers or materials of relevance to the various grounds upon which Ostrer asserts that he is entitled to a new trial or to have his conviction and sentence vacated, including most particularly his contention that the Government and the Government's main witness in this prosecution failed in their obligation to make a full and truthful disclosure to the defense of the full scope of the "agreement" between them.

Respectfully, etc.

Alan Dershowitz

Alan Dershoiwtz
Faculty Office Building
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(617) 495-4617
Counsel for Louis Ostrer

Harvey A. Silverglate

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Local Counsel to Louis Ostrer

Harvey A. Silverglate
Silverglate, Shapiro & Gertner
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(617) 723-2624
Co-counsel for Louis Ostrer

TO: Lawrence B. Pedowitz, Esquire
Assistant U.S. Attorney
One St.Andrew's Plaza
New York, New York 10017

Dated: April 14, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA : 71 Cr. 558 (CLB)

v.

LOUIS OSTRER, : NOTICE OF MOTION FOR PRODUCTION OF DOCUMENTS

Defendant.

------------------------------x

PLEASE TAKE NOTICE that the Defendant-Movant, by his undersigned counsel, will move this Honorable Court, the Hon. Charles L. Brieant, United States District Judge, at a time and place convenient to the Court, for an order that a copy of the complete pre-sentence report prepared by the Probation Office of this Court upon the Defendant's conviction in January, 1973, be made available to Ostrer's counsel.

Counsel will further move that any and all other communications to the Court (with the exception of the Memorandum on Behalf of the United States in Connection with Sentencing, filed March 4, 1973), if preserved in documentary form, made to the Court to inform its April 12, 1973 sentencing decision concerning the Defendant Louis C. Ostrer be similarly made available to Ostrer's counsel.

Counsel will further move for the production of any memoranda, notes, reports, and any and all other documents, in whatever form, concerning any interviews, discussions, agreements, etc. between former Assistant United States Attorney Robert Morvillo (and/or any other member of the prosecution) and Michael Hellerman concerning, but not limited to, any documents giving any information in regard to any promises, concessions, favors, financial considerations, and any other sort of either affirmative agreement or indication that the Government would not oppose, directly or indirectly, certain actions, which promises, concessions etc. may have been offered or given in connection with the Government's and Hellerman's dealings in regard to his cooperation with the prosecution of this and other cases.

Respectfully submitted,

Alan Dershowitz

Alan Dershowitz
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(617) 495-4617
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Local Counsel to Louis Ostrer

TO: Lawrence B. Pedowitz, Esq.
Assistant U.S. Attorney
One St.Andrew's Plaza
New York, New York 10017

Dated: April 14, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------x

LOUIS OSTRER

v.

UNITED STATES OF AMERICA

---------------------------------x

71 Cr. 558 (CLB)
77-Civ. 1805 (CLB)

Affidavit

STATE OF NEW YORK
COUNTY OF NEW YORK

RICHARD H. WYNN, being duly sowrn, deposes and says:

1. I am an attorney duly authorized to practice in the state and federal courts in New York. I represent Louis Ostrer in various matters.

2. I was made aware recently by my client Mr. Ostrer, that Doubleday & Company, Inc., of Garden City, New York, a publishing company, was planning shortly to publish a book entitled Wall Street Swindler written by Michael Hellerman (with Thomas C. Renner). I was also told by Mr. Ostrer that he suspected that Mr. Hellerman might include in the book items about himself (Mr. Ostrer).

3. Shortly thereafter, I obtained a copy of the book from my client, who indicated that he received it from his Boston counsel, Harvey A. Silverglate, Esq. I perused the

book, and immediately initiated contacts with Doubleday and its attorneys in an effort to give Doubleday fair warning that certain passages of the book, insofar as they pertain to Mr. Ostrer personally, were considered by my client and myself to constitute libel.

4. On April 14, 1977, at approximately 3:00 p.m., I telephoned Robert N. Callagy, Esq., of the firm of Satterlee & Stephens, counsel for Doubleday, in order to discuss the subject matter of my letter of March 31, 1977 to the President of Doubleday, protesting misstatements about Mr. Ostrer in the book. I had spoken previously with Mr. Callagy, and I had promised to supply him with a list of the errors in the book.

5. On the phone, I told Mr. Callagy that I would supply the list of errors as soon as possible, and I asked him if he was aware of any IRS liens against Mr. Hellerman's advance or proceeds earned from the book. Mr. Callagy replied that he knew of no such liens.

6. During the course of my conversation with Mr. Callagy, which lasted for about five minutes, I told him that I had been informed that certain portions of Hellerman's book contradicted Hellerman's sworn testimony against Louis Ostrer at the Belmont Franchising trial. Mr. Callagy then informed me that prior to publication, Doubleday & Company had verified the manuscript with the United States Attorney's Office, and Doubleday had been informed that the information contained

in the manuscript was accurate. I then asked Mr. Callagy if Harold F. McGuire, Jr., Esq., the trial prosecutor in the Belmont Franchising trial, had corroborated the manuscript, and Mr. Callagy responded that Mr. McGuire had done so.

Richard H. Wynn

Signed and sworn to before me on
this _____ day of April, 1977.

Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs. — 71 CR 668 (CLB)

LOUIS OSTRER,

Defendant.

LOUIS OSTRER

vs. — 77 Civ. 1805 (CLB)

UNITED STATES OF AMERICA

NOTICE OF SUPPLEMENTAL MOTION TO PRODUCE COURT ORDERS AND RELATED PAPERS

Please take notice the the Defendant-Movant, Louis Ostrer, by his counsel, will make an application to the Court, the Hon. Charles L. Brieant, United States District Judge, for an order that the following documents be produced and made available to the undersigned counsel:

1. The contents of the sealed envelope containing court orders in 70 Cr. 967 (United States v. Michael Hellerman, et al.) which document is noted on the docket sheet of that case as having been filed on August 11, 1975.

2. The contents of the sealed envelope which was filed in 70 Cr. 967 and ordered impounded and placed in the cashier's vault, as noted in the February 10, 1976, docket entry in that case.

case.

3. The contents of the envelope containing Exhibit #1, filed in 71 Cr. 559 (*United States* v. *Edward Polermo*) and ordered sealed and impounded, as indicated by the docket entry dated December 13, 1971.

In the alternative, counsel will move that the Court order that those orders under seal as noted above, be made available to the Court for *in camera* inspection to determine whether those orders contain any papers or materials of relevance to the various grounds upon which Ostrer asserts that he is entitled to a new trial or to have his conviction and sentence vacated, including most particularly his contention that the Government and the Government's main witness in this prosecution failed in their obligation to make a full and truthful disclosure to the defense of the full scope of the "agreement" between them.

Respectfully submitted,

Alan Dershow

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Local Counsel for Louis Ostrer

To: Lawrence B. Pedowitz, Esquire
Assistant United States Attorney
One St.Andrew's Plaza
New York, NY 10017

Dated: April 25, 1977

Best Copy A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA, :

- v - : **AFFIDAVIT**

LOUIS OSTRER, : 71 Cr. 558 (CLB)

Defendant. :

- - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
COUNTY OF NEW YORK :
SOUTHERN DISTRICT OF NEW YORK)

JOHN R. WING, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, and I have been the Chief of the Fraud Unit in that office since June, 1971.

2. This affidavit is submitted in response to the defendant Ostrer's motion for a new trial.

3. On the basis of certain passages in Michael Hellerman's book, the defendant Ostrer alleges that I made certain promises to Hellerman about the conditions of his confinement. Specifically, the book states that in return for Hellerman's cooperation in a particular bribery matter, I told him that the United States Attorney's Office would see to it that he would not be placed in a prison but instead would be housed in a federal safe house for the duration of his sentence. That statement is incorrect. I made no such promise to Mr. Hellerman in return for his cooperation in the specific bribery matter or in connection with anything else.

vailable

JRW:dl

4. On numerous occasions Hellerman's attorneys and Hellerman did request that our office arrange to place Hellerman in a safe house should he receive a prison sentence because of the substantial dangers to which he might be exposed in prison as a result of his testimony against major organized crime figures. I have no specific recollection of the date of these conversations but I believe a number of them occurred prior to the time of Hellerman's sentence in early November, 1972 and I further believe that I attempted to explore with the Department of Justice and the United States Marshal's Service the possibility of having Hellerman serve any prison sentence in a safe house. The written agreement between Hellerman and the United States Attorney's Office contained a provision to the effect that we would take every necessary step to secure his safety and knowing of death threats against another witness who had testified against some of these same organized crime figures there was no doubt in my mind that there was substantial danger to Hellerman's life. Neither I nor anyone else in this office ever promised Hellerman or his attorney that he would or could be placed in a safe house to serve his sentence, but I am sure we told at least his attorney that we would consider the matter and see what we could do about it. It is my recollection that efforts in this regard were undertaken without success and that prior to his sentence Hellerman

and his attorney were advised that he would have to serve any prison sentence in a jail institution. I believe that in October I was involved in efforts to determine what prison facility might satisfy the safety requirements and at the time of my trip to Hellerman's relocated home that prison had been selected. The statement in the book that I gave Hellerman the right to pick his prison is incorrect. I never told him that, and that was not a fact.

5. Ostrer further alleges that he was improperly denied certain 3500 material obtained from Hellerman by me during the week of extensive interviews. This allegation is also based on statements in Hellerman's book which are factually incorrect. In the first place, I was not assigned the task of compiling a "3500 file" to turn over to defense counsel in connection with Hellerman's trial testimony. Prior to my November 1972 visit with Hellerman he had been interviewed by myself or other Assistant United States Attorneys about several major stock fraud cases including Ostrer's Belmont Franchising case. The purpose of my November 1972 visit with Hellerman was to debrief him about various other criminal matters of which he had knowledge and which had not previously been discussed with him in any substantial detail. Hellerman had already been extensively debriefed about the Belmont case in which Ostrer was a defendant by Assistant United States Attorney McGuire, and to the best of my recollection that matter was

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not discussed during my November 1972 interview. Upon returning to New York I did prepare a memorandum for Assistant United States Attorney McGuire listing those matters which Hellerman had told me about involving some potential criminal liability on his part. In view of the fact that he was not being prosecuted on those matters, this memorandum was disclosed to defense counsel as possible Brady material.

6. Ostrer further suggests that it is difficult to believe that Hellerman got the last adjournment of his surrender date without the consent of the Government, but it is my best recollection that that is a fact. Ostrer further suggests that I was present at an occasion when Deputy Marshal Tony Anthony spoke briefly with Chief Judge Edelstein concerning Hellerman's safety. The claim is not expressly supported by the book which merely indicates that I brought Hellerman's lawyer Tom Edwards to a particular room where Hellerman was waiting prior to this alleged encounter with Judge Edelstein. I have no recollection of any such incident involving the marshal and Judge Edelstein.

JOHN R. WING
Assistant United States Attorney

Sworn to before me this

day of , 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA :

- v - :

LOUIS OSTRER, :

Defendant. :

- - - - - - - - - - - - - - - - - - x

AFFIDAVIT
71 Cr. 558 (CLB)
77 Civ. 1805 (CLB)

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

THOMAS D. EDWARDS, being duly sworn, deposes and says:

1. I am a member of the law firm of Chaplin, Barzun & Casner, 24 Federal Street, Boston, Massachusetts. From approximately July 1971 until approximately May 1973, Vincent Broderick and I represented Michael Hellerman. Mr. Broderick represented Hellerman from July 1971 until approximately November 30, 1976.

2. I have been informed by Assistant United States Attorney Richard Weinberg that questions have been raised concerning promises and representations made by the Government to Michael Hellerman. Other than what is contained in the written agreement between Hellerman and the Government, I am aware of no other promises or representations made by the Government to Michael Hellerman or to his attorneys.

3. No representative of the Government ever stated to me or in my presence that the Government would take a favorable position or urge the Court to act favorably on any motion to reduce sentence that was filed on Hellerman's

behalf. To my knowledge, Hellerman had no understanding with the Government concerning any motion to reduce sentence.

4. No representative of the Government ever promised Hellerman in my presence that the Government would allow Hellerman to serve his prison term in a safe house. As Hellerman's attorney, I believe that paragraph five of the agreement with the Government meant that the Government would take all steps necessary to secure Hellerman's physical safety, and that the most secure place Hellerman could be placed was in a safe house. I emphasized this point to the Government many times but they declined to give me an assurance.

5. At no time was the amount of restitution that Hellerman was to make to the victims of his frauds, part of Hellerman's agreement with the Government. Vincent Broderick and I informed the Government that Hellerman was prepared to make restitution of $100,000. The Government indicated that the amount of restitution was not part of the Government's agreement with Hellerman and that the Government considered this to be a matter between Hellerman and the Government. That is, that if restitution was made, it might or might not have some influence on the sentencing judge. At the time of sentence, Hellerman informed me that he only had $12,500 for restitution, and Mr. Broderick and I informed Judge Lasker of Hellerman's willingness to pay $12,500 as restitution.

6. I was never informed by Vincent Broderick, Robert Morvillo, or any other person that Robert Morvillo had asked Vincent Broderick to reduce the legal fee Mr. Broderick and I were to charge Michael Hellerman.

7. I knew that Michael Hellerman travelled to Europe while he was cooperating with the Government. I had no knowledge that he left the country with substantial sums of cash.

8. I have no present recollection of being with Michael Hellerman when he had any contact or conversation with Chief Judge Edelstein during the trial of Louis Ostrer.

Thomas D Edwards

THOMAS D. EDWARDS

Sworn to before me this

28 day of April, 1977

Notary Public

JEANETTE ANN GRAVES
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--------------------------------x

UNITED STATES OF AMERICA :

: **AFFIDAVIT**

-v-

: 71 Cr. 558(CLB)
77 Civ. 1805

LOUIS OSTRER, :

Defendant. :

--------------------------------x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

HAROLD F. McGUIRE, JR., being duly sworn, deposes and says:

1) I am a member of the law firm of Gilbert, Segall and Young, 430 Park Avenue, New York, New York. I was an Assistant United States Attorney in the Southern District of New York, from 1969 through early 1974, and in that capacity I was responsible for the prosecution of John Dioguardi and Louis Ostrer in Indictment 71 Cr. 558.

2) I have been informed by Assistant United States Attorney Richard Weinberg that certain questions have arisen concerning (a) my knowledge about activities of Michael Hellerman during 1972, (b) certain alleged promises made to Mr. Hellerman which were not disclosed to defense counsel in this case, and (c) the government's alleged failure to disclose certain documents and information which were properly discoverable pursuant to Brady v. Maryland and Title 18, United States Code, Section 3500. I submit this affidavit in response to those allegations.

3) At the time during 1972 when Mr. Hellerman traveled to Europe--while he was under indictment and secretly cooperating with the Government--I had no knowledge that he was making such a trip. I did learn of the trip at some later date, but I have no knowledge which would suggest that Hellerman took substantial sums of cash to Europe or that he deposited any money in a Swiss bank account during that trip.

4) I made no agreement with or promise to Hellerman or his attorneys concerning the Government's position regarding any motion to reduce his sentence. I was not aware at the time of the trial in the above-captioned case, and I am not aware at the present time, of any representation, promise, or agreement by the Government relating to any motion to reduce sentence which Hellerman might file.

5) At the time of Hellerman's testimony, and at the present time, I had and have virtually no knowledge of his financial circumstances except that he was constantly complaining of his shortness of funds; in any event, I did not believe he was perjuring himself when he stated that he did not have sufficient funds to make $100,000 restitution to victims of his frauds, but that he hoped eventually to have sufficient funds.

6) I did not acquiesce in any motion by Hellerman to stay his surrender until after Christmas, 1972. I am unaware of any Government representative acquiescing in such a motion.

7) I never promised Hellerman that Morris Winter would not be indicted in any case, nor did I promise him anything concerning the disposition of charges against Winter. I am not aware of any representative of the Government who made any such promises or representations to Hellerman. Winter had been indicted in this case and was awaiting a separate trial at the time defendants Ostrer and Dioguardi were tried. I did participate in decisions, following the Ostrer/Dioguardi trial, as to the disposition of the charges against Winter.

8) I recall taking no notes of my meetings with Hellerman which could be construed as 3500 material other than what was furnished to defense counsel as Exhibits 3544 and 3545 for identification. I know of no other 3500 material as to Hellerman other than what was furnished to his trial counsel.

9) I made, and I am aware of, no representations or promises to Hellerman or to his attorneys relating to the conditions of his confinement other than what is stated in the written memorandum of agreement between the United States and Michael Hellerman. That agreement was of course disclosed to defense counsel during the trial. During the trial in this case, I was unaware of where Hellerman would spend his period of incarceration. As far as I was concerned, that was up to the Bureau of Prisons, with due regard for Hellerman's safety and the necessity that he be available for interviews and testimony.

10) To the best of my recollection, I did not have any information at the time of the Ostrer/Dioguardi trial about any matter involving Natco or the release of an $80,000 sum to Hellerman, nor do I now remember having learned any such information at a later time.

11) I had no role whatsoever in the writing or publication of "Wall Street Swindler." I did not know until approximately a week ago that such a book existed or was contemplated. I was never asked by anyone to verify the accuracy of any portion of the book. I have not read the book. To the best of my recollection, I do not know, and I have never met or spoken to, Thomas C. Renner who I am told co-authored the book.

HAROLD F. McGUIRE, JR.

Sworn to before me
this 25th day of April, 1977

DEBORAH A. LUGOWE
Notary Public, State of New York
No. 31-4600403
Qualified in New York County
Commission Expires March 30, 197..

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--X

UNITED STATES OF AMERICA, :

-v- :

LOUIS OSTRER, :

Defendant. :

--X

AFFIDAVIT

71 Cr. 558 (CLB)
77 Civ. 1805 (CLB)

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

ROBERT G. MORVILLO, being duly sworn, deposes and says:

1. I am a member of the law firm of Martin, Obermaier & Morvillo, 1290 Avenue of the Americas. New York, New York 10019. I was an Assistant United States Attorney in the Southern District of New York, and from approximately March 1970 until July, 1971 I served as the Chief of that office's Frauds Unit, and from July, 1971 until approximately April, 1973 as Chief, Criminal Division.

2. I have been informed by Assistant United States Attorney Richard Weinberg that allegations have been made relating to the following: a) My knowledge of Michael Hellerman's activities; b) promises and representations made by the Government to Hellerman; and c) the Government's failure to furnish trial counsel with material discoverable pursuant to Brady v. Maryland and Title 18, United States Code, Section 3500. I submit this affidavit in response to these allegations.

3. During the course of my government employment, I never had any conversation about Michael Hellerman's legal fee with the Honorable Vincent T. Broderick, United States District Judge, Southern District of New York, who was then Michael Hellerman's attorney.

4. I never promised or told Michael Hellerman that Morris Winter would not be indicted. Indeed Winter was indicted. I made no promise or representation to Hellerman concerning the disposition of Mr. Winter's case.

5. While I did know that Michael Hellerman was traveling to Europe after his bail limitations were extended, I had no knowledge that he was leaving the country with substantial sums of cash. I have no knowledge that he deposited any money in a bank account in Switzerland.

6. I cannot recall taking any notes of my meeting or conversations with Michael Hellerman which could be construed in any way as "a substantially verbatim recital of an oral statement" made by Hellerman which relates to the subject matter of Hellerman's testimony as contemplated by Title 18, United States Code, Section 3500.

7. I have no recollection of making any promises or representations to Hellerman or to his attorneys relating to the Government's position if Hellerman should move to reduce his sentence. I have no recollection of making any promises or representations to Hellerman or to his attorneys other than what is

stated in the written agreement as to the conditions of Hellerman's

confinement. I am not aware of any other representative of the Government making any promises or representations to Hellerman or to his attorneys on these matters.

8. I did not suggest to Hellerman or to Thomas Renner that a book be written about Hellerman's activities. At the request of the attorney for the publisher I did read portions of page proofs of a book which I have since been informed is called Wall Street Swindler and I have attached to this affidavit a copy of my correspondence with the publisher's attorney with regard to his requests.

9. The assertion that the United States Attorney's office had surreptitiously arranged for the release of $80,000 of "Natco" funds so Hellerman could use that money for his personal use is absolutely false. At some point Hellerman asked me to make these funds available to him. I refused his request. I concluded, however, that the Government did not have the legal right to maintain custody or control over these funds which belonged to Natco Beauty Supply Center, Inc. I thereafter approved the turning over of these funds to the attorney for Natco Beauty Supply Center, Inc. I explicitly informed Mr. Hellerman and Mr. Stephen Shustik, President of Natco that they could be prosecuted if these funds were improperly used.

10. I have no recollection of knowing that Michael Hellerman paid or owed any money to a Joseph Lichtman. I did not exert any pressure on Lichtman to drop his claims against

Hellerman. I am not aware of any Government representatives exerting any influence on Lichtman to drop charges against Hellerman.

11. I made no promise or representation to Hellerman or his attorneys concerning any taxes he might owe. As to any criminal prosecution, I have no recollection of making any significant promises or representations to Hellerman or to his attorneys other than what is contained in the written agreement between Hellerman and the Government.

Robert G Morvillo
Robert G. Morvillo

Sworn to before me this
28th day of April, 1977.

Katherine Hor

KATHERINE HOR
Notary Public, State of New York
No. 31-4634011
Qualified in New York County
Commission Expires March 30, 1978

SATTERLEE & STEPHENS
277 PARK AVENUE
NEW YORK, N.Y. 10017

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TELEX NO. 223437
CABLE "SATERFIELD" NEW YORK

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PAUL EDGAR SWARTZ
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COUNSEL
JAMES F. DWYER
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WASHINGTON OFFICE
1701 PENNSYLVANIA AVENUE, N. W.
(SUITE 1100)
WASHINGTON, D. C. 20006
TELEPHONE (202) 298-6358

May 18, 1976.

BY HAND

Robert G. Morvillo, Esq.
Messrs. Martin, Obermaier & Morvillo
1290 Avenue of the Americas
New York, New York 10019

Dear Bob:

I saw you at a distance at John Martin's house last Sunday evening, but the expansiveness of the Martin mansion did not permit our paths to cross.

Some time ago you will recall I spoke to you about a manuscript written by Michael Hellerman. At the time Hellerman had not written the manuscript and I was just trying to get a handle on him to be able to assess the manuscript when it arrived. Well, it now has and I have reviewed it and asked the author for various substantiating material to back up statements he has made.

In that regard, I am wondering if you could look at pp. 395 to 592 in which you are mentioned prominently. What I am after is an idea from you whether you feel that the statements made by the author on these pages are fair and reasonable.

Sincerely,

Robert M. Callagy

Robert M. Callagy

mat
Enclosures

August 2, 1976

August 3, 1976

Robert M. Callagy, Esq.
Satterlee & Stephens
277 Park Avenue
New York, New York 10017

Dear Bob:

I am returning to you pages 395 - 592 of the Hellerman manuscript. As I told you by phone, due to the press of business, I have only been able to read up to page 506.

It is, of course, impossible for me to remember with precision many of the specific events depicted in the manuscript. My overall sense is that while there are some inaccuracies (at least as to my recollection), they appear to be of a minor nature.

Unfortunately, without going back and checking diaries, memos and transcripts, I can't give you a much better assessment as to the accuracy of the manuscript.

I am sorry that this has taken such a long time and hope that even these limited remarks will be helpful to you.

Thank you for the courtesy of sending this draft along. I really wish I had more time to finish it.

Very truly yours,

Robert G. Morvillo

RGM:kh
Enclosures

Personal

AUG 10 1976
MARTIN, OBERMAIER & MORVILLO

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BRYAN WEBB

COUNSEL
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WASHINGTON OFFICE
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TELEPHONE (202) 298-6358

August 9, 1976

Mr. Robert G. Morvillo
Martin, Obermaier & Morvillo
1290 Avenue of the Americas
New York, New York 10019

Dear Bob:

Thanks for your letter of August 6th. If you could put me in touch with the other Assistant U.S. Attorneys to whom you referred in your letter, I would be most grateful.

Sincerely,

Robert M. Callagy /cn

Robert M. Callagy

RMC/cn

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

LOUIS OSTRER,

Defendant.

77 Civ. 1805 (CLB)

MOTION TO AMEND MOTION TO VACATE SENTENCE

Louis C. Ostrer, the movant in the above-numbered case, hereby moves that this Honorable Court permit him to amend his Motion to Vacate Sentence, filed April 14, 1977, by adding the following ground for relief as GROUND SIX to be inserted as paragraph 12(F) in the aforementioned motion:

12(F) GROUND SIX (Government's Failure to Disclose Full Extent of Hellerman's Past Criminal Conduct): As is more fully set out in the Affidavits of Counsel and as will be more fully demonstrated at an evidentiary hearing, the Government has within its possession considerably more information concerning Michael Hellerman's criminal history than the items set out in the sparse memorandum of Assistant United States Attorney John Wing which was provided to the defense at the close of Hellerman's testimony at Ostrer's trial. Hellerman's book, Wall Street Swindler, sets out in some detail the course of his dealings with the Government and shows that the Government has knowledge of many more schemes, frauds, crimes, and other machinations by Hellerman than those which were made known to the defense. The additional material would have been highly useful to the defense in further impeaching Hellerman and, as a result, could well have induced a juror to hold a reasonable doubt as to the movant Louis Ostrer's guilt in the Belmont Franchising case.

As grounds for this motion to Amend, the movant states that the above ground for relief is actually a "sub-ground" of the allegation already set out in Grounds 3 and 4 of his Motion to Vacate Sentence that the "new" ground does not raise matters which would take the Government by surprise in light of the movant's previously filed papers, and that this motion to amend is being filed out of counsel's caution that various grounds for relief in this action be stated as clearly as possible even prior to the planned evidentiary hearing on May 11, 1977.

Respectfully submitted,

Alan Dershowitz
Faculty Office Bldgg.
Harvard Law School
Cambridge, Ma. 02138
(617) 495-4617

Harvey A Silverglate

Harvey A. Silverglate
Ann Lambert Greenblatt
Silverglate, Shapiro & Gertner
217 Lewis Wharf
Boston, MA. 02110
(617) 723-2624
co-counsel to Louis Ostrer

Richard Wynn
Wynn & Atlas
230 Park Avenue
New York, NY 10017
(212) 679-9429
local counsel to Louis Ostrer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--------------------------------x

UNITED STATES OF AMERICA

v.

LOUIS OSTRER,
defendant.

--------------------------------x

77 Civ. 1805 (CLB)

NOTICE OF MOTION

PLEASE TAKE NOTICE that the Defendant-Movant, by his undersigned counsel, will make an application to the Court, the Hon. Charles L. Brieant, United States District Judge for an order that the following documents be produced and made available to the undersigned counsel:

Each and every document listed at pages 1819-1280 of the transcript of the trial in 73 Cr. 599 (the "At-Your Service Leasing trial"), which materials were provided to the defense at that trial. (A copy of those transcript pages is appended to this motion.)

The documents there listed include:

1. "3595": "the grand jury testimony of Michael Hellerman on March 22, 1973."
2. "3596": "A memorandum decision of Judge Lasker in connection with the reduction of sentence of Michael Hellerman."

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3. "3597": "agreement between Michael Hellerman and U.S. Attorney's office regarding his cooperation, protection and restitution to victims of his crimes."

4. "3598": "notice of motion for a reduction of sentence filed by Vincent L. Broderick on behalf of Michael Hellerman."

5. "3599": "transcript of the proceedings before Judge Lasker in connection with the application to reduce the sentence."

6. "3600": "an interview of this defendant by agents of the IRS on February 5, 1973, regarding the shylocking activities of the defendant Lombardo."

7. "3601": "a memorandum to Judge Lasker from Robert G. Morvillo in connection with the sentencing of Michael Hellerman. The memorandum is dated November 2, 1972."

8. "3502": "a memorandum from Mr. Wing to Mr. McGuire dated January 8, 1973, relating to information volunteered by Hellerman which indicates his involvement in the the following criminal activity."

9. "3503": "Hellerman's charge in connection with this case, information 72 Cr. 1206, that is, this charge relating to the At Your Service Leasing case."

10. "3604": "undated notes of James Schreiber."

11. "3605": "notes of Schreiber on 7/9/73 and 7/10/73."

12. "3606": "an affidavit of Michael Hellerman dated March 26, 1973."

Respectfully submitted,

Alan Dershowitz

Alan Dershowitz
Faculty Office Bldg.
Harvard Law School
Cambridge, MA. 02138
(617) 495-4617
counsel to Louis Ostrer

Harvey A. Silverglate

Harvey A. Silverglate
Ann Lambert Greenblatt
Silverglate, Shapiro & Gertner
217 Lewis Wharf
Boston, Ma. 02110
(617) 723-2624
co-counsel to Louis Ostrer

Richard Wynn
Wynn & Atlas
230 Park Ave.
New York, NY 10017
(212) 679-9429
local counsel to Louis Ostrer

TO: Richard Weinberg, Esq.
Assistant U.S. Attorney
One St.Andrew's Plaza
New York, NY 10017

dated: May 6, 1977

Helloman on November 3, 1972.

3595 is the grand jury testimony of Michael Hellerman on March 22, 1973.

3596 is a memorandum decision of Judge Lasker in connection with the reduction of sentence of Michael Hellerman.

3597 is the agreement between Michael Hellerman and U.S. Attorney's office regarding his cooperation, protection and restitution to victims of his crimes.

3598 is notice of motion for a reduction of sentence filed by Vincent L. Broderick on behalf of Michael Hellerman.

3599 is the transcript of the proceedings before Judge Lasker in connection with the application to reduce the sentence.

b3

3600 is an interview of this defendant by agents of the IRS on February 5, 1973, regarding the shylocking activities of the defendant Lombardo.

3601 is a memorandum to Judge Lasker from Robert G. Morvillo in connection with the sentencing of Michael Hellerman. The memorandum is dated November 2, 1972.

3502 is a memorandum from Mr. Wing to Mr. McGuire dated January 8, 1973, relating to information volunteered

Hellerman which indicates his involvement in the following criminal activity.

3503 is Hellerman's charge in connection with this case, information 72 Cr. 1206, that is, this charge relating to the At Your Service Leasing case.

3604 are undated notes of James Schreiber.

3605 are notes of Schreiber on 7/9/73 and 7/10/73, I believe.

And 3606 is an affidavit of Michael Hellerman dated March 26, 1973.

MR. GOLDBERG: Let the record show that I am handing Mr. Schreiber a subpoena directed to Ira Schultz calling for him to appear on November 28, 1973, at 10 A.M.

(Adjourned to November 19, 1973, at 10 A.M.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOUIS OSTRER,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

77 Civ. 1805 (CLB)

Affidavit

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAY GOLDBERG, being first duly sworn, deposes and says:

1. I am an attorney-at-law in New York and am a member of the Bar of this Honorable Court.

2. During 1972 and 1973, I was trial counsel to John Dioguardi, a co-defendant of Louis Ostrer who was tried with Mr. Ostrer in the Belmont Franchising Corporation securities and mail fraud case, 71-CR-558.

3. After searching my files and my memory, and after speaking with Mr. Edelbaum, who was Mr. Ostrer's trial counsel, I have refreshed my recollection on the question of whether or not a copy of the indictment in the so-called "Natco/Merchandise Plus bankruptcy fraud" (United States v. Falgiano et ali., 71-CR-476) was turned over to me either before or during the Belmont trial.

4. I have concluded that the Natco indictment was not turned over to me. My recollection is based upon the following facts and reasoning. Prior to the Belmont trial, and at a time when I did not yet know that Michael Hellerman was working with the Government as a cooperating individual, I interviewed Mr. Hellerman in my office. During the course of that interview, Mr. Hellerman mentioned to me his involvement in the Natco/Merchandise Plus bankruptcy fraud. It was on the basis of this oral information, obtained by me from Hellerman, that I asked Hellerman a few questions about this fraud during the Belmont trial. (See pages 741-742 of the Belmont trial transcript.)

5. I am quite certain that this interview of Mr. Hellerman was the only source of information I had about this bankruptcy fraud, for if I had before me the Natco indictment at the time of the Belmont trial, I feel certain that I would have used the additional information contained in that indictment in order to question Mr. Hellerman more extensively on this fraud.

6. I am sure to a moral certainty that I had no inkling at the time of the Belmont trial that Mr. Hellerman was the beneficiary, directly or indirectly, of $80,000. of Natco/Merchandise Plus funds that he obtained, directly or indirectly, from the office of the United States Attorney.

The reason for my certainty on this point is that had I possessed such information at the time of trial, I certainly would have examined extensively on the subject.

Jay Goldberg

Signed and sworn to before me
on this _____ day of June, 1977.

Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOUIS OSTRER,
Petitioner

-vs-

UNITED STATES OF AMERICA,
Respondent.

77 Civ. 1805 (CLB)

Affidavit

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MAURICE EDELBAUM, being first duly sworn, deposes and says:

1. I am an attorney-at-law licensed to practice in New York, and I am a member of the Bar of this Honorable Court.

2. I was trial counsel during 1972 and 1973 for defendant Louis Ostrer in the so-called Belmont Franchising SEC and mail fraud, United States v. Louis Ostrer et ali., Docket Number 71-CR-558.

3. I have reviewed my file and my recollections. I have also spoken with Jay Goldberg, Esq., counsel for the co-defendant in the Belmont trial. I have thus refreshed my recollection as to the question of whether or not a copy of the indictment in the so called Natco/Merchandise Plus bankruptcy fraud (United States v. Falgiano, 71-CR-476) was turned over to me either before or during the Belmont Franchising trial.

4. I have concluded that the Natco indictment was not turned over to me. My recollection is based upon the following facts and reasoning. In the first place, I believe I have a fairly good memory, and I have no recollection of having ever seen the Natco indictment at the time of the Belmont Franchising trial. There were not that many indictments turned over to me by trial prosecutor Harold McGuire so that it is unlikely that I would have forgotten if I had seen the Natco indictment. Furthermore, in light of the fact that I considered indictments against Hellerman, the conduct they represented, and the dispositions of those indictments to be relevant on the issue of Mr. Hellerman's credibility, I believe I would have remembered seeing the Natco indictment had it been turned over to me.

5. Furthermore, had I seen a copy of the Natco indictment at the time of trial, I am sure to a moral certainty that I would have asked some questions about Hellerman's role in that fraud. I have examined the trial transcript, and I have noted the very few questions asked of Mr. Hellerman by Attorney Jay Goldberg on Natco. Had I had the Natco indictment in front of me at the time, I am quite certain that I would have asked additional questions of Mr. Hellerman based upon information contained in that indictment.

6. In any event, I am certain that at the time of the Belmont Franchising trial I had no information that Mr. Hellerman was the beneficiary, directly or indirectly, of $80,000. of Natco/Merchandise Plus funds that he obtained, directly or

indirectly, from the office of the United States Attorney. In fact, I had no knowledge whatever about this $80,000. transaction. The reason for my certainty on this point is, first of all, I am sure that had I possessed such information, I would have examined Mr. Hellerman very extensively on that subject, and I almost certainly would have put on the witness stand other persons involved in the transaction. This would have been too critical a matter not to have made a substantial impression on my mind and my memory, had I known about it at the time.

Maurice Edelbaum

Signed and sworn to before me
on this 14 day of June, 1977.

Barry Fallick
Notary Public

[illegible] M. FALLICK
NOTARY [illegible] NEW YORK
No. 31-4620-[illegible]
Qualified in New York County
Commission Expires March 30, 1979

file copy

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOUIS OSTRER,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

77 Civ. 1805 (CLB)

Affidavit of Counsel

HARVEY A. SILVERGLATE, being first duly sworn, deposes and says:

1. I am Harvey A. Silverglate, counsel for Louis Ostrer in this action.

2. I have received from Leonard Wexler, Esq., counsel for Thomas C. Renner, a cassette tape containing less than one-half hour of excerpts from cassette recordings made by Mr. Renner of interviews of Michael Hellerman in preparation for the book Wall Street Swindler. Mr. Wexler's affidavit of June 15, 1977, filed herewith and appended hereto, makes reference to this cassette containing excerpts.

3. This cassette is reported by Mr. Wexler and Mr. Renner to contain segments from the recorded interviews which were not transcribed by Mr. Renner. Mr. Renner had earlier supplied to AUSA Weinberg and myself a loose-leaf notebook containing all of his transcriptions of cassette interviews of Hellerman, and apparently these excerpts were the only portions of the recorded interviews that were not in the looseleaf notebook of transcriptions.

4. I have listened to the cassette of excerpts, and I have found only one excerpt which bears on any of the eight areas enumerated in my letter to Mr. Wexler dated May 19, 1977, in which I asked for recordings bearing on those points in the book Wall Street Swindler where Mr. Hellerman's testimony at the evidentiary hearing appears to back away from or contradict what is stated in the book. The one relevant excerpt to which I refer is a portion of an interview in which Michael Hellerman states that Louis Ostrer lost $105,000. in the Belmont Franchising deal.

Signed and sworn to under the pains and penalties of perjury on this 9th day of June, 1977, at Boston, Massachusetts.

Harvey A. Silverglate

STATE OF NEW YORK)
)ss.:
COUNTY OF SUFFOLK)

LEONARD D. WEXLER, being duly sworn, deposes and says:

That your deponent is a member of the firm of MEYER & WEXLER, attorneys at law and maintains his office at 28 Manor Road, Smithtown, New York.

That your deponent is admitted to practice in the State of New York since 1951 and admitted to practice in Federal Courts since 1956.

That your deponent has listened to the original tapes presented by one THOMAS RENNER, author of the book, Wall Street Swindler, alledgedly tapes made between MICHAEL HELLERMAN and THOMAS RENNER.

That your deponent has listened to the following tapes pertaining to the following pages and found that the original records duly represent what is in the transcripts:

Tape 8	Pages 94-97	The Belmont Deal
Tape 9	Page 107	Napco
Tape 9	Pages 110-112	Turning As A Witness
Tape 9	Pages 116-117	Morvillo-Hellermen
Tape 10	Page 121	Morvillo-Broderick
Tape 11	Pages 136-139	Swiss Bank and Restitution
Tape 12	Pages 152-155	Save House Life and Trip to Europe
Tape 14	Pages 179-180	Family in Swindles
Tape 16	Page 195	Osterer and The Blood Machine
Tape 17	Page 199	Morris Winters
Tape 18	Pages 214-215	Hellermen-$250,000. and Government Deal

MEYER & WEXLER
ATTORNEYS AT LAW

That as part of this affidavit your deponent is submitting a recording of the original tape 11 referring to transcript page 138-139 which your deponent could not thoroughly understand in the recording and, therefore, your deponent is sending a recording of the original to clarify any possibly discrepancies that may exist.

Your deponent has also included in the recording parts of tape [illegible] page 96 of transcript containing materials not included in th[illegible]script; parts of tape 16, page 95, materials not included in the transcript; and a section of the original tape dated August 11, 1974, concerning telephone conversations between MICHAEL HELLERMEN and THOMAS RENNER.

LEONARD D. WEXLER

Sworn to before me this

15th day of June, 1977

Antoinette M. Olsen

ANTOINETTE M. OLSSEN
NOTARY [illegible]
No. [illegible] York
Term Expires March 30, 1978

MEYER & WEXLER
ATTORNEYS AT LAW

310

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X
:
LOUIS OSTRER,
:
Petitioner,
:
-against-
:
UNITED STATES OF AMERICA,
:
Respondent.
- -X

77 Civ. 1805-CLB

FINDINGS AND CONCLUSIONS

(Following Hearing on Petition Pursuant to 28 U.S.C. § 2255)

Brieant, J.

On April 14, 1977,[1] Louis Ostrer ("Ostrer"), filed his petition pursuant to 28 U.S.C. §2255, to vacate his January 26, 1973 conviction following a jury trial before Chief Judge Edelstein for eleven counts of stock fraud including violations of 15 U.S.C. §§77q(a), 77x, 78j(b) and 78ff. Rule 10b-5 (17 C.F.R. 240.10b-5), promulgated thereunder by the Securities and Exchange Commission, federal mail fraud statute (18 U.S.C. §1341) and the conspiracy laws (18 U.S.C. §371) arising out of the Belmont stock swindle. As a result of this conviction, Ostrer had been sentenced to a term of three years imprisonment and fined $55,000.00 in April of 1973.[2]

Ostrer's instant petition alleges several grounds for relief,[3] all arising out of a single unexpected event. In late March 1977, more than four years after his conviction, Ostrer learned that Michael C. Hellerman, one of the Government's major witnesses at his trial, had co-authored an autobiographical memoir entitled Wall Street Swindler ("WSS"), which was about to be published. After a careful reading of the manuscript, of which he obtained a pre-publication uncorrected proof, Ostrer concluded that the Government had repeatedly violated his constitutional right to a fair and just trial by intentionally suppressing material in its possession, which would have been useful to the defense in attacking Hellerman's credibility.

In his petition Ostrer alleges that the Government failed to satisfy its obligation under Brady v. Maryland, 373 U.S. 83 (1963), to provide any and all exculpatory evidence which might prove helpful to the defense. It is undisputed that Ostrer's trial counsel specifically requested that the Government make available any material bearing adversely on the credibility, character or reputation of Hellerman. Ostrer now contends that Hellerman's book, and his testimony at the hearing, demonstrates conclusively that the Government did not reveal to the defense all of the information in its possession. Ostrer further claims that possession of this information during the trial would have enabled him to avert conviction by destroying Hellerman's credibility with the jury. Clearly, the conviction was dependent on Hellerman's testimony.[4/]

Ostrer alleges several specific instances of the Government's failure to disclose information concerning Hellerman. All have been considered. Those worthy of discussion are discussed under the separate headings below.

As a separate ground for relief, Ostrer alleges that the Government failed to turn over to the defense material which it was required to produce under 18 U.S.C. §3500. This section, commonly called the Jencks Act, requires that the Government make available to the defense prior to cross-examination all statements of a Government witness which are within the Government's possession, commonly called "3500 material", or in New York courts, "Rosario material." By custom and practice in this Circuit, this requirement has come to include all records of discussions between the prosecution and the witness, records of debriefing sessions of the witness, and any documents or prosecutors notes which incorporate the substance of any statements of the witness as, for example, internal memoranda of the United States Attorneys Office and FBI 302s. Ostrer asserts that the Government failed to turn over existing 3500 material and also "purposely failed to generate" 3500 material in order to deprive the defense of useful material with which to cross-examine Hellerman.

Ostrer specifically charges that Hellerman's book makes clear that the then Chief of the Criminal Division of the United States Attorneys Office of the Southern District of New York ("the Chief") took extensive notes of his conversations with Hellerman; yet, no such notes were turned over to the defense. Similarly, Ostrer charges that material prepared by Assistant United States Attorney ("AUSA") John Wing was never turned over to the defense in its entirety.

The third and final ground on which Ostrer bases his claim for relief is the charge that Hellerman committed perjury at the Belmont trial, both with and without the prior knowledge of the Government. Ostrer argues that the extent of Hellerman's perjury establishes that he was an inherently incredible and unreliable witness whose testimony could not be accepted as true.

An evidentiary hearing was conducted by this Court on May 10, 11 and 31, 1977 in order to make a determination as to whether or not the Government had violated its Brady obligations or 18 U.S.C. §3500; and to determine whether Hellerman had committed perjury at trial with respect to the specific grounds alleged by Ostrer, thereby denying petitioner's right to a fair trial. Post-hearing briefs have been received and considered. The Court has accepted and considered the final published edition of Hellerman's book, now on sale, as evidence in chief. The Government persists in its objections to this. A short answer is that the hearsay declarant (Hellerman) was available for cross-examination. Indeed, he declined to vouch for his book, without reservation, and falsely impugned the accuracy of his co-author, an experienced writer who organized the book from transcripts of tapes dictated by Hellerman. The book does have some obvious errors and a general aura of Munchausen about it. If further discussion is necessary we note that much of it comprises admissions against penal and financial interest; it was created while Hellerman was in the federal witness protection program, and he was encouraged to write it by prosecutors, marshals and other members of officialdom who facilitated this great effort before during and after. As a final bizarre twist, Hellerman, who has been relocated under another identity to prevent his death at the hands of mobsters, says that where he now is he could not be seen in possession of the book.

FACTS

A. Brady Violations

Petitioner's first ground for seeking relief is, as we have noted, the Government's alleged failure to provide the defense with all of the Brady material in its possession concerning Hellerman.

1. The Natco Swindle

Ostrer's first and most important contention is that the Government purposely withheld information concerning its role in assisting Hellerman in embezzling $80,000.00 which Hellerman, through a fraudulent scheme had drained unlawfully from Natco, Inc. and Merchandise Plus, Inc. ("Natco").[5]

As the bankruptcy of Natco became inevitable Hellerman became exceedingly anxious to obtain the last $80,000.00 still remaining in the company's account. Hellerman wrote in WSS and in his testimony at the evidentiary hearing before me said that he desperately needed these funds in order to pay off loansharks to whom he owed large sums of money. Hellerman apparently believed that delay in repaying these loans would endanger his life. At this time he was at liberty and was an undercover "cooperating individual". He therefore devised a scheme whereby Steven Schustek, then in nominal control of the company, would draw a check for the $80,000.00 in his own name, cash it and remit the proceeds to Hellerman, who would then pay off his debts. Such a check was eventually drawn to the order of, and signed by Steven Schustek. (Transcript "Tr." at 32).

However, Hellerman's plan did not work. His co-conspirator in the Natco fraud, Sam Falgiano a/k/a Sammy Feet, suspecting Hellerman's plan, determined to seize the proceeds for himself, by depositing and cashing the check in a casino in the Bahamas.[6/]

Upon learning of Feet's intention, Hellerman related the whole story of the Natco conspiracy fraud to the Chief, who then arranged for the FBI to freeze the proceeds of the check, then in a Florida bank.

Having prevented Feet from stealing the money, the Government now faced the problem of determining how to dispose of the funds which had come into its possession. By this time the Government was certainly fully aware of the conspiracy to commit fraud culminating in Hellerman's attempt to siphon off Natco's last $80,000.00, since the full story of the fraud had been related to the Chief by both Hellerman and Schustek. (Tr. at 262, 267).

Hellerman testified at the evidentiary hearing that during his talks with the Chief he made it known that he desperately needed these funds to pay off his debts to the loansharks, who were threatening his life. The Chief did not deny, in his testimony at the hearing, that Hellerman had spoken of his pressing need for substantial sums of money (Tr. at 254), and had, in fact, requested that the $80,000.00 in Natco funds be turned over to him. (Tr. at 263-64).

When Hellerman suggested to the Chief that the Government release the $80,000.00 in Natco funds to him, this suggestion was rejected. The Chief determined, however, that his office had no legal right to continue the hold on these funds since, according to the Chief's testimony, to do so might cause Natco to go into bankruptcy thereby giving rise to a possible cause of action by Natco's creditors against the federal government. (Tr. at 268). Faced with this perceived problem the Government concluded that these funds should be returned to a Natco corporate bank account. The Government, it seems, viewed such a means of returning the funds to Natco as something which would break the chain of causation, so that if Hellerman thereafter stole the money from Natco's account a second time, or Falgiano or Schustek did so, those concerned could make the traditional Navy officer's claim: "It didn't happen on my watch, sir."

To achieve this end, the Chief apparently let it be known to Hellerman that the funds would be released only to an attorney representing Natco, so that the attorney's participation would assure that the money would go into the corporate account, rather than Hellerman's pocket.

On January 29, 1971, three days after Natco's petition in bankruptcy was filed, Edward Kurland, Esq., presented a letter to the United States Attorneys Office (Exhibit F) in which he stated that he represented Merchandise Plus (Natco) and was authorized to make a demand for the $80,000.00 check made out to Stephen Schustek, then in the possession of the United States Attorney. This letter was accompanied by a retainer appointing Kurland, which was handwritten and signed by Stephen Schustek (Ex. F). Upon receipt of these impressive documents, the Government turned over the $80,000.00 check to Kurland, who immediately deposited it in a special account in his own name. Once the check cleared, the funds were transferred to a newly established account in the name of Merchandise Plus from which Schustek subsequently withdrew all but $23.00 (Ex. G). Schustek then turned the money over to Morris Winters, Esq. (Hellerman's personal attorney who shared an office suite with Edward Kurland), who then turned it over to Hellerman. Thus, the$80,000.00 less the fees of the two attorneys, did indeed find its way forthwith to Hellerman, who doled it out to pay off loansharks who were pressing him, and for other personal purposes.

What are we to make of this bizarre story? Three questions spring immediately to mind. Did the Government knowingly allow $80,000.00 in stolen funds to be made available to Hellerman? If the Government did, in fact, aid Hellerman in this way, was it not obligated, under the Brady doctrine , to so inform the defense counsel at Ostrer's trial? Finally, if the Government failed to inform defense counsel of the Natco indictment and/or the fate of the stolen $80,000.00. was this failure intentional.[7/]

Not unexpectedly, petitioner would have us draw the worst possible inference, and conclude in effect that the Government was knowingly facilitating larceny by Hellerman. We must remain mindful that: "A wisdom developed after an event and having it and its consequences as a source is a standard no man should be judged by." Costello v. Costello, 209 N.Y. 252 (1913).

After reviewing the testimony and the exhibits received in evidence at the evidentiary hearing, the Court finds the following facts: (1) the Government prevented Sammy Feet from stealing the $80,000.00 in Natco funds by freezing the proceeds of the check which Schustek and Feet had caused to be deposited in the Bahamas casino, which had deposited it in turn in Florida; (2) Hellerman and Schustek did reveal the full story of the Natco swindle, including their own participation, to the Government, thereby making the Government fully aware of the intended goal of Natco's bankruptcy, before it released the $80,000.00 to Kurland; (3) the Government was aware before it reached its decision to release the funds to an attorney authorized by Schustek, that Hellerman desperately needed this money to pay off loansharks who were threatening his life. Moreover, it was in the Government's interests to leave Hellerman at liberty on an undercover basis as an informant rather than placing him in a safe house. Nor did Hellerman want to go into hiding or flee.

In the face of all of this, the Government released the funds to attorney Kurland, specially retained by Steven Schustek for the sole purpose of cashing this check, without investigating either Kurland or his intentions, or those of Schustek with respect to the $80,000.00. In addition, the Government made no effort to ascertain whether Natco was actually then bankrupt (which it was as of January 26, 1971, although Merchandise Plus did not file until March 8, 1971) or whether the intended fraud was sufficiently advanced so that the seized money could be held in the Government's possession as evidence, or to prevent its theft by Hellerman.

Hellerman expressed his own belief, at the evidentiary hearing, and in WSS, that the Government intentionally allowed him to retrieve the $80,000.00 thus conferring a substantial benefit on him. He also testified, however, that the Chief warned him that if he used these funds he and Schustek would be held liable and subjected to prosecution. The Chief, in his testimony, denied strenuously that these funds were intentionally released to Hellerman so he could steal them, citing his specific warning to Hellerman and Schustek should they resume their prior attempt to embezzle the funds. Ostrer, who must bear the burden of proof, has been unable to confirm the contention that these funds were intentionally released to Hellerman so he could pay the loansharks.

This, however, does not conclude the matter. The Court finds, as it must based on the record before it, that it should have been readily apparent to the Government, when it did release these funds, that the money inevitably would end up in Hellerman's pocket. In effect, the Government chose to look the other way. While denying Hellerman's direct request for the money, the Government accorded him the opportunity to gain possession of it indirectly by the charade of having the corporation's "attorney" demand and receive it for deposit in a corporate bank account.[8/] By conscious avoidance the Government thus intentionally eased the way for Hellerman to benefit from its decision to release the $80,000.00 in stolen funds to an attorney "representing" Natco.

We must now consider whether the Government was obligated under Brady to reveal this $80,000.00 matter to defense counsel at the Ostrer trial. The Brady obligation requires that the Government make the defense aware of all benefits and promises which it has conferred upon a cooperating witness, in order that the defense will have adequate information with which to attack that witness' credibility on cross-examination.

To begin with, the Government did not inform defense counsel at trial of Hellerman's indictment in the Natco or Falgiano case. This oversight is surprising since defense counsel at trial were given copies of all of Hellerman's other indictments. (Belmont tr. at 470). In addition, most of Hellerman's other indictments were included in the Memorandum of Agreement, entered into between Hellerman and the Government on October 19, 1972, a copy of which was made available to the defense.[9] The failure to inform counsel of Hellerman's Natco indictment is certainly a failure to comply with Brady. However, we do note that Jay Goldberg, Esq. trial counsel for Ostrer's co-defendant, John Dioguardi, knew of the Natco indictment by way of a pre-trial interview with Hellerman. Goldberg briefly questioned Hellerman about Natco in the presence of the jury. The extent of this questioning makes it abundantly clear that he knew of Hellerman's part in the Natco swindle, but not of the release of the $80,000.00 by the U.S. Attorney's Office. Maurice Edelbaum, Esq., Ostrer's trial counsel, knew nothing of Natco except what he heard at the trial and therefore did not question Hellerman on the subject.

Defense counsel in the exercise of reasonable diligence should have known of the Natco indictment because, having been filed in 1971 in this district, it was a matter of public record. But they could not have known of the $80,000.00 benefit to Hellerman, which was not described in the indictment.

For its part, the Government denies having conferred any benefit on Hellerman with respect to this $80,000.00, and therefore disclaims responsibility for informing defense counsel of the matter. AUSA McGuire who tried the Belmont case, did not himself know of the $80,000.00. By April 26, 1971 (See Ex. G), the Chief and several other AUSAs were aware of the ultimate disposition of the $80,000.00, to the extent that they knew that Hellerman's man Schustek had taken it. Under the principal set forth in Giglio v. United States, 405 U.S. 150, 154 (1972), that the prosecutor's office is a single entity for Brady purposes, we conclude that if the fact of Government participation with respect to the $80,000.00 is Brady material, then the Government was obligated to make this information known to the defense.

Having found that but for the Government activity previously described, Hellerman would not have gained access to the $80,000.00, we are constrained to find that the Government thereby conferred a benefit on its cooperating witness Hellerman which should have been disclosed to the defense. The Chief's contemporaneous warning to Hellerman and Schustek that they would be prosecuted if they stole this money was obviously a paper tiger, since Hellerman knew full well that if the Government didn't want him to get the money, all it had to do was keep it, or release it to a Natco receiver, its creditors or the bankruptcy court. Hellerman was right. He was never prosecuted for stealing the $80,000.00

Prior to Ostrer's trial the Government was aware that Hellerman had actually obtained the funds and had used them to pay off the loansharks, and that its treatment of the money made it possible for the witness to help himself to a benefit. This knowledge should have been communicated to defense counsel at the Belmont trial as Brady material.

We cannot be sure whether this oversight was intentional or negligent. People intend the natural and ordinary consequences of their acts, and we may therefore infer that the Government's failure to [illegible]rt defense counsel to this matter was intentional. The Government argues that its failure to notify the defense of the $80,000.00 was an innocent oversight resulting from the belief that no benefit had been conferred on Hellerman by Government, a belief which led inevitably to a failure of communication between prosecutors.[10]

The Court's finding of an intentional non-compliance results from several items, including: a) the Government's failure to include the Natco indictment in the Memorandum of Agreement; b) the Government's failure to provide the defense with a copy of the Natco indictment; c) the Government's disclosure to Judge Lasker, in a memorandum of November 2, 1972 of Hellerman's cooperation in the investigation of the Natco swindle; and, d) the absence of any mention of the Natco funds in the memorandum prepared by AUSA John Wing and made available to the defense, listing matters in which Hellerman was involved but for which he would not be prosecuted. The memorandum prepared for Judge Lasker by AUSA Wing, over the signature of the Chief, was never turned over to defense counsel as either Brady or 3500 material, nor was the underlying fact of Hellerman's participation in the Natco swindle initially, or in the $80,000.00 caper. So many oversights may not be regarded as merely a coincidence.

2. The Swiss Trip

During the summer of 1972, just prior to Ostrer's trial, Hellerman's bail was enlarged, and he was given permission by Judge Lasker to make a trip to Europe (including Switzerland) at a time when he was awaiting sentence. The Government offered no opposition to Hellerman's request, which was sought openly from the Court and when granted, became a matter of public record.

Ostrer now alleges that while on this trip Hellerman, with the knowledge and acquiescence of the Government, deposited substantial sums of money in a secret Swiss bank account. Ostrer contends that the Government's failure to inform the defense counsel of this trip constitutes another Brady violation.

There is no doubt that Hellerman visited Switzerland in the late summer of 1972. He was tired and needed a rest! Also, he was considering whether he would relocate there when he took up a new identity following completion of all his testimony. Nevertheless, no credible proof is offered that Hellerman deposited a large sum of money, or any money in a secret Swiss bank account during this trip. Hellerman wrote in WSS, and testified at the evidentiary hearing that he did not deposit substantial sums of money in Switzerland. He recalled being stopped at the airport when departing for Europe at the instance of a personal creditor who activated the New York Port Authority Police on the suspicion that he was carrying large sums of stolen money. The police search disclosed no large sum of money. After verifying that Hellerman had permission to leave the country, the police allowed him to depart.

The Chief, as well as AUSA McGuire, in affidavits submitted in these proceedings, deny having had any knowledge that Hellerman took substantial sums of cash out of the country with him, depositing it in a foreign bank account. The Chief also testified at the evidentiary hearing that he had no such knowledge. I accept this testimony as truthful.

The only evidence offered by Ostrer of Hellerman's having deposited $300,000.00 in a secret Swiss bank account is the affidavit of April 12, 1977 and the testimony of Martin Roth, a lawyer convicted of obstruction of justice and stock fraud.[11/] Roth testified that Hellerman personally informed him that he had concealed a substantial sum of money in a secret Swiss account. Roth testified that he repeated the story to Hellerman's former attorney, Mr. Ernest Schlachter. Neither party called Schlachter as a witness.

Roth appeared vindictive towards Hellerman. Although Roth, an attorney, has not been disbarred, his credibility is weak. Besides the likelihood that Roth is lying there is the further likelihood that Hellerman, whose whole life consisted in fraternizing with the "wise guys", falsely told Roth that he had money in Switzerland, and did so as part of his general braggadocio. In any event, having observed both Hellerman and Roth testify on this point, and on the basis of all the evidence I decline to find that Hellerman deposited $300,000.00, or any money, in a secret Swiss bank account. I also find that the Government was unaware of any such action by Hellerman. Even if Hellerman did secrete money during his trip to Switzerland, Ostrer has been unable to prove that Hellerman stashed money in Europe with the knowledge and consent of the United States Attorney's Office, which is the critical question. If the Government had allowed Hellerman to stash a large sum of money in Switzerland it would have conferred a substantial benefit on Hellerman, which it would then have been compelled to disclose to the defense.

The Government is required to communicate as Brady material information which it knows to be true. It is not required to communicate its fears or speculations. Thus, Ostrer's reliance on the fact that the Chief had expressed the fear that Hellerman might wish to stash funds or flee during his trip to Europe (Tr. at 312) is misplaced since such speculation is not Brady material.

The only benefit which the Government knowingly conferred upon Hellerman here was the decision not to oppose Hellerman's plans for a trip to Europe while he was awaiting sentence. Actual permission to take the trip was given by Judge Lasker in response to Hellerman's motion.

Failing to oppose permission for Hellerman to travel was certainly a reward for his cooperation. Had the defense possessed this information it would then have had the opportunity to cross-examine Hellerman with respect to the trip and to argue to the jury that when the Government failed to oppose this junket, it conferred a benefit. Indeed it could have been argued that Hellerman intended to secrete substantial sums of money in Switzerland. The Government should have alerted the defense to Hellerman's European trip, since it failed to oppose bail enlargement to permit the trip to go forward, a rather unusual benefit under the circumstances of this case.

However, the Swiss trip was a matter of public record. It took place through the authorization of an independent judicial officer, who might well have declined to authorize it without regard to the Government's failure to oppose. I decline to find that the Government's failure to disclose the Swiss trip to the defense was intentional. It appears to have been simply an oversight, due either to a mistaken belief that the defense was aware of the trip or to the conviction that merely failing to oppose Hellerman's request of a judicial officer for permission to travel while awaiting sentence was not a benefit which resulted in the creation of *Brady* material. Whichever it was, the Court does not find an intentional suppression of *Brady* information.

3. Hellerman's Motion to Reduce Sentence

Ostrer seems to allege that the Government had some kind of undisclosed agreement with Hellerman or his attorneys in effect during Ostrer's trial, relating to Hellerman's March 3, 1973 Rule 35 motion to reduce sentence.[12] However, no evidence was offered to support this contention. No witness testified that the Government had reached any agreement with Hellerman regarding his sentence. In fact, AUSA McGuire states in his affidavit that he was unaware of any Government promise or representation to Hellerman relating to the Rule 35 motion. The Chief, in his testimony, corroborates McGuire's statement, which remained uncontradicted throughout the hearing. The Government, in fact, took no position on Hellerman's motion to reduce. Since we are unable to find that any promise was made to Hellerman which was not revealed to the defense, there can be no violation of the Government's *Brady* obligation in this respect.

Ostrer's real complaint here is that AUSA McGuire made a facially absurd and unfounded statement to the trial Court but not in the presence of the jury concerning Hellerman, underlined below.

> "I can make a representation, and that is what is concerning me, the government has not made any representation, express or implied that it will or even that it might make any communication of any kind whatsoever to the parole board. Indeed, it is my understanding that this witness' [Hellerman] attorneys do not expect to reply (sic) for an early parole *nor do they expect to make an application for a reduction of sentence*." (Belmont tr. at 696.)

As the record shows, McGuire's representations were true, but his expectation was wrong. Although it is likely that McGuire should not have stated his expectations to the Court, this complaint by Ostrer is untimely. Every sentenced hoodlum intends to make an application to reduce pursuant to Rule 35 F.R. Cr. P. There is nothing to lose but the paper. Ostrer has known since March, 1973 that McGuire's expectation was unfounded and wrong, yet he waited four years to challenge it. This contention has no place in a habeas petition said to be based on the revelations in Hellerman's book. It is rejected for want of merit.

4. Hellerman's Place of Imprisonment

In his petition, Ostrer alleges that the Government made a promise or representation to Hellerman that he would be able to serve his sentence in a "[illegible] ouse" as opposed to an ordinary prison and that this promise was not revealed to the defense in accordance with Brady. Once again, however, there is no evidence in the record to support this contention. The Memorandum of Agreement, which was made available to the defense, states that the Government "will take such precautions as are necessary to secure his [Hellerman's] physical safety," while he is in prison. This statement adequately notified the defense that the Government might seek to have Hellerman serve his time in a safe house rather than an ordinary prison. (Tr. at 373-77). Moreover, AUSA Wing testified at the evidentiary hearing that prior to January, 1973 no promises or representations were made to Hellerman as to where his sentence would be served. (Tr. at 379).[13/] This testimony stands uncontradicted. In fact, Hellerman's account in WSS confirms that he was not promised that he would serve his sentence in a safe house, although he made every effort to obstain such a promise. Since there was no unrevealed promise, there is no Brady violation.

5. Reduction of Hellerman's Attorneys Fees

Ostrer alleges that Hellerman received a benefit from the Government by way of the Government's successful efforts to gain a reduction in his attorneys fees. Hellerman reports in WSS and his testimony, that when he first consulted his chosen attorney he was asked for a retainer of $100,000.00. In the logical belief that once the attorney was informed of his status as a cooperating witness, the fee would be substantially reduced, Hellerman asked the Chief to notify the attorney of this fact. The Chief did call the attorney and Hellerman's fee was subsequently reduced by $50,000.00. Hellerman thanked the Chief for his efforts.

The Chief agrees generally with Hellerman's account of these events. He testified that he did call the attorney and discussed Hellerman's status as a cooperating witness, a fact of which the attorney was previously ignorant.[13A] He did not discuss the fee during this conversation. Since the amount of effort required to represent a cooperating witness is obviously less, counsel did reduce the fee.

The Government maintains that it committed no impropriety in revealing Hellerman's status as a cooperating witness to his attorney at his request. We agree with the Government that it neither sought nor won a fee reduction for the benefit of Hellerman. The record amply supports this conclusion. The Chief in his testimony denied that he interceded with respect to Hellerman's legal fees.

Of course, the Court does recognize that the result or consequence of the Chief's call to counsel was a reduction in fees. The Chief may have expected that this would be the result of the call. Nonetheless, the Government had the right, perhaps even the obligation, to inform Hellerman's counsel of his true status, regardless of the potential beneficial effect of this information. Hellerman's status as a cooperating witness had to have been communicated by the prosecutor to the witness' counsel, or sought by counsel from the prosecutor at some time. The fee reduction was incidental to this requirement. The Government cannot be said to be conferring a benefit through the disclosure of required information simply because that information happens to be beneficial. We therefore find that the Government did not violate Brady by failing to inform defense counsel of the Chief's contacts with Hellerman's counsel.

6. Non-prosecution of Hellerman's family

Hellerman claims that after negotiations by his attorneys the Government agreed not to prosecute any members of his immediate family. Hellerman testified to his belief that this agreement was an important part of his deal with the Government. This covenant was not made a part of the Memorandum of Agreement nor was it communicated to the defense.

Since Thomas Edwards, Esq., who assisted counsel in representing Hellerman was responsible for negotiating the agreement with the Government, Edwards is found to be a person with intimate knowledge of the contents of the agreement between Hellerman and the Government. Edwards testified that the Government informed him that whether Hellerman cooperated with the Government or not, it had no interest in prosecuting Hellerman's relatives. (Tr. at 394-95). Edwards further testified that he was "certain...that this had nothing to do whatsoever with any quid pro quo...between the Government and Hellerman." (Id. at 398.)

The Chief, in his testimony, corroborated the fact that the nonprosecution of Hellerman's family was not part of the Government's agreement with Hellerman. The failure of the Memorandum of Agreement to mention Hellerman's family also confirms Edwards' version of the story. Hellerman may have thought that his lawyers won a big concession when, in fact, the nonprosecution was a matter of prosecutorial discretion exercised by the Government unilaterally.

Since we do not find that the Government conferred a benefit on Hellerman in return for his cooperation, the decision not to prosecute Hellerman's family was not Brady material, which must be turned over to the defense. Government actions which fortuitously benefit a witness are different from benefits in exchange for testimony which must be revealed to the defense to provide material for an attack on a witness' credibility.

B. Violation of 18 U.S.C. §3500[14]

Ostrer claims that Hellerman's book and testimony reveal that the Government failed to turn over §3500 material which the Government generated regarding Hellerman. Hellerman testified that the Chief and other AUSAs took extensive notes of certain of their conversations. He describes one incident in great detail. According to Hellerman the Chief had a desk drawer which contained "extensive notes" which the Chief had taken at a session on Natco with Hellerman in the Berkshire Hotel. When, at a later date, the Chief told Hellerman that he had no such notes, Hellerman suggested that he look in his desk drawer and in fact the notes were there. (Tr. at 74-78, WSS at 269).

The Chief's testimony before me was that he took no notes of his meetings with Hellerman, which was corroborated by a search conducted by AUSA Richard Weinberg, during and after the evidentiary hearing, which revealed no 3500 material in the Natco file which could or should have been produced at the Belmont trial. (Gov't Brief II at 30). The Chief's testimony is also corroborated by the testimony of AUSA Wing who stated that he could recall no notes made by the Chief regarding Hellerman.

In a carefully formulated statement contained in his affidavit of April 28, 1977, the Chief stated that he could not recall taking any notes of conversations with Hellerman which,

> "could be construed in any way as 'a substantially verbatim recital of an oral statement' made by Hellerman which relates to the subject matter of Hellerman's testimony as contemplated by Title 18, United States Code, Section 3500."

AUSA Harold F. McGuire states in his affidavit that he produced no 3500 material other than that submitted to defense counsel at trial. McGuire also states (in further corroboration of the Chief's testimony) that he knows of no other 3500 material relating to Hellerman's testimony at Belmont which was not made available to defense counsel.

Hellerman's testimony as to the Chief's "drawerful" of notes remains uncorroborated. There is ample evidence to the contrary on this point. We are left with no more than a speculation that certain notes exist. Mere speculation is insufficient to support Ostrer;s claim that the Government failed to provide existing 3500 material.

The other possibility which must be examined is that the Chief and AUSA Wing did take notes of their interviews with Hellerman but felt that these notes did not concern matters as to which Hellerman could testify on his direct examination in Belmont or that these notes did not consist of a "substantially verbatim recital" (18 U.S.C. §3500(e) definition of 'statement') of oral statements by Hellerman. This theory is supported by Wing who testified that he turned over to AUSA McGuire prior to the Belmont trial fifteen to twenty pages of his notes from Hellerman interviews. (Tr. at 369). Wing also testified, however, that these notes did not contain material relevant to Belmont. For the most part these notes concerned other investigations and other criminals. Wing prepared his two-page Brady memorandum which was given to defense counsel, by extracting any reference in these notes which related to Belmont or bore on Hellerman's credibility. It is well established that only those notes containing actual statements adopted or approved by the witness need be turned over to defense counsel as 3500 material. See Goldberg v. United States, 425 U.S. 94 (1976).

During the evidentiary hearing the Court instructed the Government to make available any of the Wing notes not already turned over to the defense, which might be construed as Brady or 3500 material. (Tr. at 370). This order included material relating to Ostrer, the Belmont trial or the prior criminality of Hellerman. The search of these notes was carried out by AUSA Weinberg, who reported that the notes contained no further Brady material. (See letter of AUSA Weinberg to Harvey Silverglate, May 31, 1977). We find, therefore, that Ostrer has failed to prove that the Government was remiss in turning over existing and relevant 3500 material to the defense at the Belmont trial.

Ostrer does not stop with the claim that existing 3500 material was suppressed. He argues, in the alternative, that the Government purposely refrained from producing 3500 material on Hellerman in order to avoid the necessity of making such material available to the defense. This contention is without merit. Ostrer is unable to cite any precedent which establishes a requirement that the Government create 3500 material. A prosecutor has the discretion to decide whether to take any notes of his conversations with witnesses and whether to include in those notes "substantially verbatim recitals" of the statements of that witness.

Ostrer's claims with respect to Brady and 3500 are essentially overlapping. The Brady obligation requires the Government to provide the defense with exculpatory information, including written or oral material in its possession which is useful for the impeachment of a Government witness. For example, if an AUSA interviewed Hellerman and learned that Hellerman was made a promise by another AUSA, or that Hellerman had committed a new offense, he would be required to alert the defense counsel to this information, regardless of whether or not he wrote it down in the witness' words. Section 3500 requires the production of Government records of a witness' actual statements. Here, the lack of substantial 3500 material does not relieve the Government of its obligation to make the defense aware (via Brady) of exculpatory or "impeaching" information. The result is the same. Either material information was withheld or it was not. The Court finds no separate violation of the Government's obligation to make existing 3500 material available to the defense.

C. Perjury by Hellerman

Ostrer alleges several instances of Hellerman's "perjury." During the Belmont trial Hellerman characterized Ostrer as his partner or as a co-conspirator in the Belmont stock swindle. In his book, on the other hand, Hellerman identifies Ostrer as another "pigeon" in Belmont, i.e., one who is himself a victim of a swindle. The characterization at trial of Ostrer by Hellerman as a conspirator rather than as a victim is viewed by Ostrer as an intentional perjury which lies at the heart of the Government's case.

Another example of Hellerman's alleged "perjury" at the Belmont trial was his claim, in connection with his own conviction, to have made restitution of $12,500.00 and his stated intention to make restitution of the remaining $87,500.00 which he had agreed to provide. Ostrer alleges that Hellerman lied again when he testified that he did not know whether Ostrer had made or lost money on the Belmont deal, since Hellerman wrote in WSS that Ostrer in fact lost $105,000.00 in the Belmont swindle. Ostrer provides other examples of contradictions between Hellerman's trial testimony and the revelations in WSS.

But beyond the particular allegations of perjury, Ostrer's contention is that Hellerman is simply a perpetual liar and therefore an inherently unreliable witness. Ostrer argues that since the Government's Memorandum of Agreement with Hellerman, which was made available to defense counsel at trial, vouches for Hellerman's credibility, the Government's knowledge of Hellerman's continuing propensity to lie required it to impart this knowledge to the defense.

In each instance of alleged perjury we must decide whether a) there was any actual perjury by Hellerman, and b) whether the Government knew of the perjury and failed to bring it to the attention of the Court and jury. Actual perjury by a Government witness is a sufficient ground for relief in a motion for a new trial if,

> "...the court should decide...[that] the jury probably would have altered its verdict if it had had the opportunity to appraise the impact of the newly-discovered evidence...."
> United States v. Stofsky, 527 F.2d 237, 246 (2d Cir. 1975).

It is not clear, however, that perjury by a Government witness raises a due process attack on a conviction sufficient to gain relief pursuant to 28 U.S.C. §2255. See Brach v. United States, 542 F.2d 4,8 (2d Cir. 1976); United States v. Franzese, 525 F.2d 27,31 n.7 (2d Cir. 1975). See also Davis v. United States, 417 U.S. 333, 345-46 (1974). If, on the other hand, the Government knowingly used perjurious testimony, a due process claim is surely raised.

At the Belmont trial, Hellerman characterized Ostrer as a co-conspirator and a "money-man". (Belmont tr. at 427-28). In WSS, by contrast, Hellerman refers to Ostrer as "another pigeon". It is also implicit in WSS that Hellerman pulled his relatives and friends out of the Belmont swindle when it started to go bad, but left Ostrer in, holding the bag.

Hellerman has not admitted perjury or directly contradicted his trial testimony. In conveying the impression, at the Belmont trial, that Ostrer was a conspirator there is no perjury. Hellerman never stated that Ostrer was not also used in some way by Hellerman and other co-conspirators. It is possible to be both a conspirator and a victim in situations like

Belmont, and nothing in Hellerman's testimony precluded the jury from drawing this conclusion. In fact, in trial Exhibit 3545, which was made available to the defense, AUSA McGuire, in an outline of Hellerman's intended testimony notes under the sub-heading "contact with Ostrer" "[Hellerman] sets Ostrer up to buy the stock." Thus, the defense was alerted to the possibility that Ostrer was set up by Hellerman and could have cross-examined Hellerman at length on this characterization.

Moreover, Hellerman does not ever label Ostrer as a "pigeon" or "sucker" in WSS or in his testimony at the evidentiary hearing. In WSS, while discussing Ostrer's role in Belmont, Hellerman states,

> "The technique was relatively simple. I'd put someone like Ostrer in the stock at $15 with a couple of brokerage houses. Now, when I wanted to sell Ostrer out, at say $36 a share, all I had to do was find another pigeon at one of the brokerage houses and sell him the stock Ostrer was holding." WSS at 210.

From this single quotation Ostrer concludes that Hellerman believes him to have been a "pigeon". This is not the only possible interpretation of this quotation, which appears in a chapter of the book entitled, "Anything For a Buck." Elsewhere in this chapter Hellerman writes that Ostrer "became interested in getting into a stock deal with me" (Id.) and that Ostrer "wanted to get in on a stock bust-out so bad he could taste it." (WSS at 209). In the full context of this chapter Hellerman is hardly describing an innocent investor who unwittingly becomes a victim of a stock fraud. Rather, he is describing someone who knowingly agreed to raise money and participate in a stock fraud. The gist of the crime was joint action to perpetrate the swindle of stock houses and members of the general investing public by purchasing and later selling. All this Ostrer did. That his group leader, Hellerman, treated him unfairly is of no relevance.

This analysis is equally applicable to Ostrer's claim that Hellerman's actions in getting his friends out of Belmont in time while leaving Ostrer in to take a loss, confirms Hellerman's use of Ostrer as a victim. Once again, Hellerman's action in leaving Ostrer in the Belmont pool does not absolve Ostrer of his role in conspiring to commit a stock fraud. In any case, Hellerman certainly did alert the Government, and in turn the defense to the notion that he was not above taking advantage of his partner. I find that Hellerman committed no perjury at the Belmont trial in characterizing Ostrer as a participant in a stock fraud. I also find that the Government was not a party to any perjury in this aspect of Hellerman's testimony.

The same reasoning must be applied to Ostrer's claim that he was unfairly described by AUSA McGuire and Hellerman as the "money man" in the scheme, since in WSS Hellerman states that he "was fully aware that Lou [Ostrer] was in hock to his eyeballs to loan sharks..." (WSS at 209). Even if this statement is true, it has no effect on Ostrer's role as a "money man" in the Belmont stock fraud. Ostrer was able by whatever means to provide Hellerman with $105,000.00 and an additional $60,000.00.[15/] (WSS at 212). Moreover, Hellerman testified at the trial that Ostrer had been forced to borrow the $60,000.00 from Hickey DiLorenzo (Belmont tr. 472-73, 484-86) and that Hellerman himself had advanced $52,500.00 to Ostrer.

(Belmont tr. 476-483). Thus, the jury was fully aware both of Ostrer's poor financial condition and of his ability to provide cash for a phony stock deal. Hellerman's characterization of Ostrer as a "money man" is not a materially false declaration.

Finally, Ostrer's claim that Hellerman committed perjury when he testified that he did not know whether Ostrer made or lost money on the Belmont deal is without merit. At the trial, when Hellerman was asked this question he responded that he did not know but could explain this answer. Ostrer's counsel permitted no explanation. (Belmont tr. at 795). In WSS Hellerman stated that Ostrer lost $105,000.00 in the Belmont deal. (WSS at 227). In the context of the entire book, however, it is clear that Hellerman does not know who really lost the $105,000.00 since he knows that some percentage of that money is borrowed. He therefore does not know how much money Ostrer personally lost, if any. The Court finds that Hellerman committed no perjury when he stated at the trial that he did not know whether Ostrer had lost money on the Belmont deal.

During the Belmont trial Hellerman testified that he had already made restitution to his victims in the amount of $12,500.00 and that he intended to make further restitution of $87,500.00. (Belmont tr. 671-72, 866-67). Actually, Hellerman had deposited $12,500.00 in escrow with his attorney for the ostensible purpose of making restitution to the various victims of his life of cri[illegible]

During his testimony at the evidentiary hearing, Hellerman admitted that he had paid no further restitution in the four years since the time of the Belmont trial, although he stated that he still intended to do so. Ostrer now alleges that Hellerman's statements at trial constitute perjury since he neither made restitution of the $12,500.00, nor obviously did he intend to make a further restitution. Ostrer further contends that the Government was aware of this perjury since it knew full well that Hellerman's escrow agent had not yet paid out the $12,500.00.

Unfortunately, Ostrer's position arises from a misconception concerning a sealed document which the Court inspected _in camera_ and then referred to, in passing, during the evidentiary hearing. Long after Ostrer's trial, Hellerman's attorney sought a return of the greater part of the $12,500.00 restitution which Hellerman had paid at the time of the Belmont trial, for the purpose of allowing Hellerman to make a new start in a business venture. Judge Lasker agreed to allow Hellerman to retrieve this money. Thus, at the time that Hellerman testified at the Belmont trial he had, in fact, made restitution of $12,500.00, to the extent that he had placed the money in escrow and under the control of the Court. There is certainly no perjury in that part of his testimony.

The second half of Hellerman's restitution testimony consists of his _intention_ to repay the remaining $87,500.00 of the restitution figure agreed to by him at the time of sentence. Hindsight has revealed that Hellerman did not fulfill his intention as stated at the Belmont trial. But how can this Court say that it was not his intention at that time to make good on his promise? Even if Hellerman knew that he was lying, it would certainly be impossible for the Government to have known that he had no intention of fulfilling his self-proclaimed expectation. There is no evidence here that the Government and Hellerman had reached an agreement, prior to the Belmont trial, that Hellerman would not have to make restitution in the amount of $87,500.00. There is no evidence whatsoever that the Government had failed to make some such promise known to the defense. There was no such arrangement. Hellerman testified as to his subjective intentions at that time. I do not find that Hellerman committed perjury by the testimony given at Ostrer's trial.

Of course a reading of WSS shows, and it should have been readily apparent at the time, that the whole idea of making restitution in the amount of $100,000.00 is on its face an illusory and foolish thing. To begin with, that sum is a drop in the bucket measured against what he stole. And most of his ill gotten gains were ripped off from fellow crooks, or unidentifiable members of the general public who bought stock when Hellerman sold. If the Court or Hellerman's counsel had attempted to find the claimants, determine the amount of their claims, and effect pro rata distribution at two cents on the dollar, they would have faced a task more complex than administering a class action recovery under Rule23 F.R. Civ. P. We must recognize this whole matter of the restitution for what it was -- high sounding words calculated to ameliorate Hellerman's sentences on three indictments. There is no showing that the concept of restitution was initiated by the Government.

Ostrer's final allegation of perjury is that Hellerman has been shown by WSS to be a hardened and continuous liar and he is therefore simply incapable of telling the truth. This is not really an allegation of a specific perjury, rather a charge that Hellerman is a liar now, and was one at the time of the Belmont trial, and the Government knew it. This argument is being made to the wrong Court at the wrong time. Whether or not we find Hellerman now to be an honest, truthful person is not significant. This same issue was in effect tendered to the jury which convicted Ostrer, and to other juries at other times in other cases. Ostrer's trial jury clearly believed enough of Hellerman's testimony to find Ostrer guilty as charged. The increment in the knowledge of Hellerman's untruthful nature over that which was known by the Belmont jury is inconsequential. The Court declines to find that as a result of Hellerman's propensity for dishonesty he must necessarily have committed perjury at the Ostrer trial. Indeed, our reading of that trial record suggests that he was a more careful witness then, than at the habeas hearing before me.

In sum, the Court does not find that on the evidence submitted here Hellerman committed any specific perjury at trial. It follows that the Government did not knowingly rely on perjured testimony at Ostrer's trial.

CONCLUSIONS

We have found that the Government violated its Brady obligation in two instances, (1) by failing to disclose to the defense its activities resulting in the release of the $80,000.00 in Natco funds which ended up in Hellerman's pocket; and, (2) by failing to disclose its consent effected by silence with respect to the permission granted to Hellerman to travel to Switzerland. There has been no Brady violation with respect to Hellerman's reduction in sentence, place of imprisonment, counsel fees, or the non-prosecution of Hellerman's family.

We have also found that the Government neither violated its obligations pursuant to 18 U.S.C. §3500 nor knowingly encouraged or allowed the use or perjured testimony by Hellerman.

Finally, we have found no proof of perjury in Hellerman's trial testimony with or without the Government's knowledge.

Thus, the only question which we must still answer is whether the Government's failure to disclose the Natco affair and the Swiss trip violated Ostrer's constitutional rights, thereby denying him a fair trial.

The standard for making such a determination is set forth in United States v. Agurs, 427 U.S. 97 (1976), which we are required to apply. Petitioner has argued that the Agurs standard is not applicable here since it was not in existence at the time of Ostrer's trial. We reject that contention. The instant petition was filed in April, 1977, well after the date of the Agurs ruling. In seeking a new trial, Ostrer is bound by the standards existing at the time his petition is considered. The Supreme Court has informed us of the correct standard for determining the materiality of undisclosed evidence, to enable us to conclude whether a new trial is constitutionally required; therefore, all prior standards are obsolete and may be regarded as having been wrong ab initio. See United States v. Corr, 77 Civ. 2642, p. 12 (S.D.N.Y. June 23, 1977).

In Agurs, the Supreme Court enunciated a tripartite test for properly applying the rule of Brady v. Maryland, in the context of three separate fact situations. Only the first two parts of the test need be considered here.

The first such category of cases is typified by *Mooney* v. *Holohan*, 294 U.S. 103 (1935), a case in which "the undisclosed evidence demonstrated that the prosecution's case included perjurious testimony and the government knew or should have known of the perjury." (Agurs at 103.)

> "In a series of subsequent cases, the Court has consistently held that a conviction obtained by the *knowing* use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* (emphasis added.)

Since we have already found that Ostrer's conviction was not obtained by the knowing use of perjured testimony (nor by perjury at all) our case is not covered by the first *Agurs* standard.[16/] Nonetheless, we note that the strict standard of materiality applied in such cases requires that the conviction be set aside, "if there is *any reasonable likelihood* that the false testimony could have affected the judgment of the jury." *Agurs* at 103. (emphasis added). The Court goes on to explain its application of the strictest standard of materiality.

> "[T]he Court has applied a strict standard of materiality, not just because they [these cases] involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth seeking function of the trial process." *Id.* at 104.

The second category of cases treated in *Agurs* is that typified by *Brady*, where the defense has made a pretrial request for specific evidence. In *Brady* the defense requested the extrajudicial statements of the witness Boblit, Brady's accomplice. One of Boblit's extrajudicial statements was suppressed. The Supreme Court found that the suppression of this statement deprived Brady of his rights.

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87.

Material evidence, in the Brady context, is defined as that evidence which might have affected the outcome of the trial. In Brady the suppressed evidence was found to be material to the question of punishment, since the evidence, a confession by the accomplice, indicated that Brady had not actually strangled the murder victim.

The instant case is a Brady type case, though there is at least one significant difference. Brady involved actual exculpatory evidence whereas we are concerned here only with evidence useful for impeachment. See Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). Such evidence does, of course, include evidence of favors , inducements, or promises. United States ex rel. Washington v. Vincent, 525 F.2d 262 (2d Cir. 1975). The other difference is that here the Government did not ignore or fail to respond to defendants' Brady request.

Prior to Ostrer's trial both Ostrer and his codefendant Dioguardi sought specific material from the Government concerning Hellerman. Dioguardi's counsel, Jay Goldberg, Esq. specifically sought,[17/]

> "any material in the possession of the Government bearing adversely on the credibility, character and reputation of Michael Hellerman;

> and...any other material relating to any matter which defense counsel could properly use in cross-examination to inquire into Hellerman's motive and bias in favor of the Government or expectation of favor from the Government." (Ostrer's Brief I at p. 8, Ostrer's Brief II at p. 97).

In response to this request, the Government gave the defense a packet of material which included the Memorandum of Agreement, trial notes of AUSA McGuire, the two-page Wing Memorandum listing several acts for which Hellerman would not be prosecuted, and copies of many of Hellerman's indictments. (See AUSA Weinberg's letter of May 18, 1977.) In addition, AUSA McGuire and the Chief orally informed defense counsel of the history of Hellerman's cooperation with the Government. (See Belmont tr. pp. 525-560). The only impeachment-type evidence which the Government failed to reveal was the Natco matter and Hellerman's trip to Switzerland.

Although we recall that in Brady the Supreme Court specifically stated that the good faith or bad faith of the prosecutor was irrelevant in making the determination of whether a defendant is entitled to a new trial, we have found that at least with respect to Natco the Government's suppression of evidence must be presumed intentional. The principle stressed in Brady was the avoidance of an unfair trial to the accused, not punishment of society for the blunders or misdeeds of the prosecutor. Brady v. Maryland, 373 U.S. at 87. This principle is reiterated in Agurs. (Id. at 110, n. 17).

This Circuit had developed a pre-Agurs standard for determining new trial motions based on "prosecutorial culpability" and the materiality of the evidence. This standard was set forth in detail in United States v. Morrell, 524 F.2d 550, 553 (2d Cir. 1975).

> "If the prosecutor has intentionally suppressed evidence or ignored evidence whose high value to the defense could not have escaped his attention, a new trial is warranted if the evidence is merely material or favorable to the defense. E.g., United States v. Kahn, 472 F.2d 272, 287 (2d Cir.), cert. denied, 411 U.S. 982, 93 S. Ct. 2270, 36 L. Ed. 2d 958 (1972); United States v. Keogh, 391 F.2d 138, 146-47 (2d Cir. 1968). If, on the other hand, the government's failure to disclose is merely inadvertent or negligent, a new trial is required only if there is a 'significant chance that this added item, developed by skilled counsel as it would have been could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.' United States v. Rosner, 516 F.2d 269, 272 (2d Cir. 1975); United States v. Seijo, 514 F.2d 1357, 1364 (2d Cir. 1975); United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969)."

See also United States v. Hinton, 521 F.2d 164, 166 (2d Cir. 1975). We regard that rule obliterated by Agurs, see page 110 of 427 U.S.

We must now determine whether this suppressed evidence is material in accordance with the standard developed in Agurs.[18/] First, we must define the term "material". In Agurs, the standard of materiality is whether the suppressed evidence probably would have affected the outcome of the trial, that is, that it creates the reasonable doubt that did not otherwise exist. See Dissent of Marshall, J. in Agurs, page 115. The standard differs from the "significant chance" standard previously used in this Circuit in cases where there was no prosecutorial misconduct. The latter standard provided as follows:

> "If there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction, then the judgment of conviction must be set aside." (Agurs, Dissent at 119).

Only if it can be held rationally that the suppressed evidence probably would have created a reasonable doubt as to defendant's guilt, may the conviction be set aside.

We conclude that in Ostrer's case no reasonable person could say that the suppressed evidence probably would have altered the outcome of the trial. This conclusion is based on the fact that the Ostrer jury was already abundantly aware of Hellerman's cooperation with the Government, the substantial benefits he had obtained thereby, and of his participation in fraudulent and illegal schemes without number.

Ostrer argues, on the other hand, that the suppressed information is substantively different from that revealed at trial and not merely cumulative, since it attests that the Government was willing to pay generously for Hellerman's testimony. We reject this argument because of three considerations. (1) The convicting jury at the trial was aware of the extensive benefits conferred upon Hellerman in exchange for his testimony. There is no essential difference between pecuniary benefits which are given in exchange for testimony and benefits in the form of freedom from prosecution.[19/] In fact, it might be argued that the benefit of less time in prison is far more valuable than a mere cash benefit to a fellow who never had any trouble getting money. (2) The Government's willingness to close its eyes to Hellerman's appropriation of the $80,000 has not been shown to have been a negotiated benefit in exchange for Hellerman's testimony. (3) There is reason to believe that Hellerman's embezzlement of the $80,000.00 was tolerated only because of the Government's awareness that unless Hellerman could repay his debts, his life, and therefore his testimony would be endangered. Thus, the $80,000.00 can be considered as merely one facet of the Government's broader program to guarantee Hellerman's safety rather than as an effort to put cash in his pocket.

During the trial the jury heard Hellerman repeatedly acknowledge his participation in numerous criminal activities. Hellerman testified that during the preceeding five years he was involved in approximately eight to twelve criminal acts for which he was not prosecuted, and three cases in which he pleaded guilty. (Belmont tr. 390-91, 602). Hellerman acknowledged his role in frauds involving the securities of Belmont Franchising Corporation, Globus, Automated Information, Minute Approval Credit, and At Your Service Leasing. (Belmont tr. 690-91; 716-17). He admitted that he was involved in having someone pay bribes to New York City policemen, and he testified to his well founded belief that the United States Attorney's Office would convince the local authorities not to prosecute him. (Belmont tr. 806-07). Hellerman acknowledged that he purchased stocks, dresses, and jewelry which he knew to have been stolen (Belmont tr. 808), and that he paid money to others for the purpose of bribing state court judges, a state liquor authority investigator, and a union delegate. (Belmont tr. 811). In addition, Hellerman testified that he had been involved in criminal activity in connection with Natco and Merchandise P[illegible]s (Belmont tr. 741), that he had been barred by the SEC from activities in the securities industry since 1961 (Belmont tr. 606), that he told Jack Kelsey to file false papers with the SEC hiding Hellerman's interest in a brokerage firm (Belmont tr. 612), and that he participated in a scheme to submit a fraudulent check to a Bahamian bank. (Belmont tr. 619). He also acknowledged disobeying court orders. (Belmont tr. at 731).

The jury also heard Hellerman testify that after he had begun to cooperate with the Government and had agreed not to engage in any additional criminal activity, he broke that promise, and continued his illegal conduct. (Belmont tr. 822-23; 938-39; 948). Hellerman testified that after he broke his promise he engaged in swindles which earned him over $250,000.00 and for which he was not prosecuted.

Finally, the summations for both Ostrer and Dioguardi were replete with references to Hellerman's corrupt and criminal activity and the"extraordinary" agreement he entered into with the Government immunizing him from prosecution for most of his crimes.

Trial counsel emphasized clearly to the jury that the Government had "bought" the testimony of a man who, having promised the United States Attorney's Office once before that he would not commit any more crimes, then went out and continued hiscorrupt and sordid activities. (Belmont tr. 1721-24; 1731-33; 1754; 1783; 1793-94).

In view of the extensive data provided to the jury, we find that the Natco information is not material, in the sense that it probably would not have affected the outcome of the trial. In words quoted from Agurs, p. 102, it "shed no light on Sewell's [read Hellerman's] character that was not already apparent from the uncontradicted evidence." Nor does the suppressed evidence raise a reasonable doubt. One more promise or benefit to Hellerman is no evidence of Ostrer's innocence. Therefore, the Court concludes that the suppression of the Natco $80,000.00 matter does not require us to grant Ostrer a new trial.

The Swiss trip does not warrant a new trial since, for the same reasons set forth above, there is no probability that this information would have raised a reasonable doubt. The jury was well acquainted with the Government's lenient treatment of Hellerman, and one more instance of Government largesse would not have been of any significance. Ostrer is therefore not entitled to a new trial based on the suppression of information concerning the Swiss trip.

BAIL

On April 1, 1977, the Court of Appeals found that Ostrer's appeal of this Court's order of November 3, 1976, [422 F. Supp 108 (S.D.N.Y. 1976)], denying, for want of power only, an extension of bail pending appellate finality, was moot since the Supreme Court had just denied certiorari on Ostrer's underlying claims with respect to which this Court had continued him on bail. Thereafter, Ostrer's surrender was directed for April 15, 1977.

On April 14, 1977, however, Ostrer filed the instant petition for relief pursuant to 28 U.S.C. §2255, which sought a continuation of bail pending the determination of issues not previously litigated and unknown until Hellerman published his book. The Government has agreed with Ostrer that this Court has the power to grant or continue Ostrer's bail if it finds that the new matters which he presents in his petitions raise a substantial challenge to his conviction, which, in the opinion of the Court, requires continued bail. In a letter to the Court of Appeals of April 11, 1977, AUSA Lawrence B. Pedowitz wrote as follows:

> "It is the Government's position that, while the District Court would be ill-advised to grant Ostrer bail on his motion to reopen the evidentiary hearing, since Ostrer's underlying claims are totally without merit, the District Court does have power to release Ostrer on bail if it sees fit."

Mr. Pedowitz was referring, in his letter, to the motion which this Court denied on April 29, 1977,which was held to be totally without merit. Nonetheless, the Government concedes, by implication, that this Court has the power to grant bail on any new motion or petition brought by Ostrer. The Court also believes that it has that power.

On April 18, 1977, by an oral order of this Court, Ostrer was continued on bail pending the determination of the instant petition. We now extend bail until the Court of Appeals shall determine Ostrer's appeal from today's orders, or otherwise direct.

Ostrer has always honored the terms and conditions of his bail. His attendance at court has been prompt and regular. Although we have denied Ostrer the substantive relief which he is seeking, we find that, again, he has raised colorable claims affecting his constitutional right to a fair trial. We cannot say that the claims raised in the instant petition are imposed solely for delay. He is entitled to seek to bring these issues before the Court of Appeals prior to his incarceration, provided he proceeds diligently to do so. See United States v. Ostrer, 422 F. Supp 93, 107-108. This is so notwithstanding the long period of time which elapsed here since the jury verdict.

So Ordered.

Dated: New York, New York
August 12, 1977

Charles L. Brieant
U. S. D. J.

FOOTNOTES

1. Ostrer's surrender had been noticed for April 15, 1977 pursuant to a mandate of the Court of Appeals issued following affirmance of a denial of a prior application for post conviction relief.

2. Shortly after the verdict Ostrer sought a new trial on the ground of incompetence of one of the jurors. This motion was denied by Chief Judge Edelstein in United States v. Ostrer, 361 F. Supp. 954 (S.D.N.Y. 1973). Ostrer's conviction, as well as the denial of that new trial motion, were then affirmed by the Court of Appeals sub nom. United States v. Dioguardi, 492 F.2d 70 (2d Cir.) cert. denied 419 U.S. 829 (1974). Ostrer then filed, on December 11, 1974, another new trial motion, alleging that the conviction was tainted as a result of an unlawful wiretap ofOstrer's premises by the New York District Attorney. After conducting an evidentiary hearing this Court denied petitioner's motion on June 4, 1976 in United States v. Ostrer, 422 F. Supp 93 (S.D.N.Y. 1976), affirmed, 551 F.2d 303 (2d Cir.) cert. denied, 97 S. Ct. 1581 (1977). Ostrer then filed a third motion for a new trial on the ground that continuous cooperation between state and federal prosecutors prior to and during his trial, must have led to the tainting of the federal prosecution, through the inevitable communication of the fruits of the illegal wiretap. Since this motion was filed after the two year statute of limitations required for new trial motions by F.R.Cr.P. 33, the Court considered the motion as a petition to set aside the conviction pursuant to 28 U.S.C. §2255. That petition was denied in a Memorandum and Order of this Court filed on April 29, 1977.

Petitioner then moved for reconsideration, based on further new evidence, and a hearing was subsequently held on May 10, 1977. The Court has now reaffirmed its denial of Ostrer's petition in a separate Memorandum and Order issued simultaneously herewith.

3. The instant petition also alleges several defects in Ostrer's sentencing proceedings. The parties have chosen, however, not to brief these allegations at this time since it is pointless to determine the validity of the sentencing if Ostrer is to be awarded a new trial. Since we cannot know whether there will be a new trial until appellate review is complete, the claims regarding the sentencing proceedings will not be treated in this decision. On resentencing, if such is required, conceivably Ostrer could receive a shorter sentence, but on the trial record a non-custodial sentence would be inappropriate in any event.

In a separatemotion filed together with the instant petition, Ostrer also moved to reopen the evidentiary hearing held to determine the competence of the juror, Geneva Rush. In addition to his earlier challenge of the juror's competence, heard by Chief Judge Edelstein, Ostrer again challenged the competence of juror Rush in his motion for a new trial filed on December 11, 1974 before this Court. At the hearing on that motion it was determined that Rush was an attendant and not a patient at the hospital where she was employed. Based on that determination, petitioner withdrew his motion. Since petitioner has presented no new evidence in his current set of affidavits concerning Geneva Rush, which had not already been before the Court of Appeals in 1974, the Court declines to consider petitioner's motion to vacate sentence based on the claimed incompetence of this juror. This branch of the motion is cumulative, repetitious and untimely.

4. In United States v. Ostrer, 422 F. Supp 93, 106 (S.D.N.Y. 1976) this Court held:

> "The proof against Ostrer was substantial, if the jury found the testimony of Hellerman credible, as indeed it must have done in order to have returned these guilty verdicts."

5. Natco and Merchandise Plus were two Long Island beauty supply companies. The swindle, concededly engineered by Hellerman with the aid of Schustek, involved Hellerman's acquisition of the ownership and control of both companies, using loanshark funds. His plan was to sell present and future inventory, default on the suppliers' bills for this inventory, and siphon off or steal the cash proceeds of the sale of the inventory from the companies, in a clandestine fashion. As was intended, this scheme, or "bust out", left the companies with no inventory, unpaid suppliers' bills, and creditors whose only recourse lay in bankruptcy court. Hellerman had been indicted in this district in 1971 for his role in the Natco swindle conspiracy. See United States v. Falgiano et al., 71 Cr. 476 and 71 Cr. 499. On October 12, 1973 the Government filed a nolle prosequi with respect to so much of this indictment as concerns Hellerman.

6. The check which Schustek had drawn to his own order was deposited by Schustek and Sammy Feet with the Paradise Island Casino in the Bahamas.

After giving the check time to clear, these two were to return to the Bahamas to obtain the proceeds of the check by a facsimile gambling scheme. When Feet returned he was informed by the casino personnel that the FBI had stepped in and seized the money. (Tr. at 42).

7. We consider infra, the ultimate question, namely: If the Government did so violate its obligation under Brady, what effect did this have on Ostrer's trial?

8. Indeed an attorney so receiving corporate funds in the regular course, and thereafter depositing them in a corporate account would have found it difficult to prevent Schustek, an authorized signatory on the Merchandise Plus accounts, from issuing checks for non-corporate purposes. Here, however, Hellerman and Schustek could not use the regular Natco bank accounts for reasons that are obvious, and therefore opened a new one solely to clear this check and comply with the Government's requirement that it be deposited in a corporate account before being stolen.

9. On October 5, 1972 the Government entered into a written agreement with Michael Hellerman in which it a) offered Hellerman a plea to one two-year count in the Belmont indictment and one two-year count in the "At Your Service" indictment (United States v. Hellerman, 72 Cr. 1246) in addition to the two-year count already accepted in the Imperial indictment (United States v. Aloi, et al., 71 Cr. 967); b) promised to secure Hellerman's physical safety while in custody;

c) promised to relocate Hellerman after his incarceration; d) agreed to drop further prosecutions of Hellerman in a specified number of cases; and e) promised to use its best efforts to dissuade state and local prosecutors from pressing their related prosecutions of Hellerman. In return for these promises Hellerman agreed to a) commit no further crimes; b) refrain from doing any business in securities; c) testify truthfully at trial if required; and d) provide the Government with information when required. If Hellerman broke any of these promises the Government would then be free to prosecute Hellerman for any of his past criminal activities.

In his letter of May 18, 1977, AUSA Richard Weinberg informed the Court that this Memorandum and other Brady and 3500 material had been turned over to defense counsel at Ostrer's trial. At the trial, AUSA McGuire informed the Court that he had "furnished [defense] counsel with [all] the various indictments in which Hellerman has been named." (Belmont tr. at 470). The Government does not dispute that the Natco indictment was not included in the batch of indictments which McGuire provided to defense counsel. (Tr. at 34).

10. Although the Government is one entity for the purpose of determining the Brady obligation, it may not be so for the purpose of determining intent. AUSA McGuire certainly did not intentionally suppress the information concerning the disposition of the $80,000.00 since he, himself, wasunaware of the fact. On the other hand, he probably knew of the existence of the Natco indictment.

In a memorandum to Judge Lasker, dated November 2, 1972, the Government outlined Hellerman's participation in security fraud matters then pending in the Southern District of New York, and described his cooperation with the United States Attorney's Office in several investigations. This memorandum, written only two months prior to Ostrer's trial, summarized Hellerman's cooperation in Natco as follows.

> "During the fall of 1970, Hellerman also alerted this office to a bankruptcy fraud then in progress which resulted in the indictment of Samuel Falgiano and others. Your Honor will recall the facts from having presided over this trial. At the time Hellerman came to us with this information we had absolutely no knowledge of this fraud. Hellerman was instrumental in persuading Steven Schusteck to become a government witness and kept this office closely advised of the final stages of the fraud. Because of Hellerman's information we were able to prevent Falgiano and others from cashing the $100,000 of corporate checks at the gambling casinos."

The Memorandum does not tell the Court, however, of the ultimate fate of the "$100,000" which was saved from Falgiano. The most significant point about this exhibit is that it was not made available to Ostrer, nor was the information contained therein imparted to his counsel.

11. Martin Roth was a close associate of Hellerman, since 1968. In 1971, Hellerman offered to pay for Roth's honeymoon, but did so with the help of a stolen credit card. Roth was convicted in December 1972 of participation in the so-called "Globus" stock fraud case, another Hellerman generated venture. Convicted on his plea of guilty to a second indictment in April, 1974, he served a total of fifteen months

imprisonment on both cases. Roth testified at the evidentiary hearing that he had Hellerman to thank for all his legal troubles. (Tr. at 405).

12. Hellerman testified at the evidentiary hearing that he had always planned to file the typical Rule 35 motion to reduce sentence. The motion was filed in March, 1973 and was heard and granted by Judge Lasker on September 28, 1973. The Government took no position with respect to this motion. Hellerman's sentence was reduced to time served with the remaining time to consist of unsupervised probation.

13. On June 1, 1977 AUSA Ri[illegible]d Weinberg furnished the Court with copies of two letters written by AUSA John Wing to Henry Petersen of the Justice Department requesting that Hellerman be allowed to serve his time in a safe house. These letters are dated February 6, 1973 and May 25, 1973, well after the completion of Ostrer's trial.

13A. Although Hellerman had a conference with his attorney, he did not disclose his status as a cooperating witness since he was acting in an undercover capacity at that time. His conference with the attorney was not in private and he was fearful that if he disclosed his status the information would be leaked.

14. 18 U.S.C. §3500 provides as follows.

> "(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means--

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

15. According to Hellerman, he and Ostrer jointly borrowed the $60,000.00 from Hickey DiLorenzo at interest of $900 per week. Ostrer raised the other $105,000.00 by borrowing from several friends, two of whom became his partners in the deal. (WSS at 212).

16. In his post-hearing brief, Ostrer now claims that Hellerman's perjury is found in his affirmative answer to the question of whether his entire agreement with the Government was embodied in the Memorandum of Agreement. We do not find that answer to constitute perjury. Both Hellerman's attorneys and the Government believed that this Memorandum did constitute his agreement with the Government. If the Government conferred other benefits upon him, either directly or indirectly, Hellerman took these benefits to be mere largesse, outside his agreement to testify for the Government. This position is not unreasonable. Perjury requires scienter.

17. The trial judge ruled that any request by either defendant inured to the benefit of the other.

18. In a case involving Government suppression of evidence, the defendant is not required to satisfy the difficult test of demonstrating that the newly discovered evidence would have resulted in acquittal. This is the standard generally applied in evaluating motions for new trial under F.R. Cr. P. 33 based on newly discovered evidence.

> "On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence would have resulted in acquittal. If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice." (citation omitted) Agurs at 111.

19. It was argued by the defense in summation that the Government had provided Hellerman with substantial financial benefit by failing to prosecute him for a $250,000.00 swindle he participated in after assuring the Government that he would go straight. (Belmont tr. at 1764-65).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--------------------------------x

LOUIS OSTRER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

--------------------------------x

77 Civ. 1805 (CLB)

Notice of Appeal

PLEASE TAKE NOTICE that the Petitioner Louis Ostrer, in the above-captioned and numbered action, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order and "Findings and Conclusions" of the District Court (Brieant, USDJ) dated August 12, 1977, denying the Petitioner's motion to vacate his conviction and sentence pursuant to 28 U.S.C. §2255.

Yours, etc.

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Dated: August 22, 1977

/4/73
.S. vs
ohn Dioguardi
ouis Ostrer
. Cr. 558

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(In open court.)

THE CLERK: United States versus Dioguardi, et al. All sides ready?

MR. EDELBAUM: Yes.

MR. GOLDBERG: Ready, your Honor.

THE COURT: Good morning, ladies and gentlemen of the panel.

By way of an announcement, I think we are singularly fortunate this morning. We have a most distinguished visitor, the Lord Chancellor of England, who is here to observe how we conduct our proceedings, and William S. Alexander, who occasionally is engaged as counsel for the British Consul in this city.

I think I must apologize to you because so many are required to stand. Unfortunately, we did not have a courtroom large enough to afford chairs for each and every one of you. And I would trust that you will give me your indulgence and try to understand that this is a fairly old courthouse and sometimes we find ourselves drastically squeezed for space.

The clerk of the court will now swear the entire panel. I understand one of the veniremen wishes to affirm rather than take an oath and that shall be done.

(Panel of prospective jurors sworn.)

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(One prospective juror affirmed.)

THE COURT: Ladies and gentlemen, please pay very close attention to my comments and questions, and if my voice doesn't carry to the rear of the room, would you please indicate that by raising your hand so I can be alerted to that fact.

I understand each and every one of you have been provided with a handbook for jurors which attempts to familiarize you with the role of the jury and the responsibility which is weighed upon the jurors. Yet I think it might be useful if I made some comments about the important service which is your calling this morning.

You have been called into court this morning to participate in a proceeding commonly referred to as picking a jury. In connection with this procedure, the Court will conduct a voir dire examination, that is to say, you will be asked certain questions to determine whether or not you should be picked to sit in this case.

Before turning to specifics, I should like to make a few observations about juries and jurors. The jury system is deeply imbedded in our law and in our tradition. It is hard to visualize our system of justice without the role of the jury. Juries are the very mainstay of that system. They are the bulwark of our republic and the guardian of our democratic way of life. For justice served nourishes the very vitality of our institutions, whereas justice denied undermines the very foundations of our liberty.

Juries to be effective and deserving of this high duty of citizenship must be the soul of integrity, impartiality, sound judgment. They must bring a dedicated sense of fair play to their deliberations. Jurors bear an awesome responsibility. Their role is that of judges. They judge and decide the facts and the credibility of witnesses. The authority of the jury in determining facts is so great that neither comment by Court nor counsel is binding upon them if it differs from their recollection.

The jury is the exclusive judge of all the facts. When it comes to the law, however, as distinguished from the facts, you are to take your instructions from the Court, and the Court alone, and you are bound by those instructions and you may not under any circumstances substitute your notions of what the law is with what you think it should be.

Now, this sounds somewhat arrogant. I must say to you that this instruction is an absolute mandate upon the Court. Should I not charge you thus, I would be derelict in not observing the law. The Court is the source of the law and must instruct you on the law, and you are

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bound by oath to accept the law to be applied to the facts as you find them to be in your good conscience.

Now the clerk will proceed to seat members of the panel in the box and then I shall continue.

THE CLERK: Juror number one , Matilda Stein. Is that Miss or Mrs.?

PROSPECTIVE JUROR NO. 1: Mrs.

THE CLERK: Juror No. 2, Robert Taylor.

Juror No. 3, Rose DaSilva.

Juror No. 4, Joseph Gmuer.

Juror No. 5, Isobel Morkewicz. Is that Miss or Mrs.?

PROSPECTIVE JUROR NO. 5: Miss.

THE CLERK: Juror No. 6, Herman Williams.

Juror No. 7, Pearl Bonner. Is that Miss or Mrs.?

PROSPECTIVE JUROR NO. 7: Miss.

THE CLERK: Juror No. 8, Mabel Rotchford.

MR. GOLDBERG: Your Honor, may we remove this so I can see the jury?

THE COURT: You may.

THE CLERK: Is that Miss or Mrs.?

PROSPECTIVE JUROR NO. 8: Mrs.

THE CLERK: Juror No. 9, Florence Stevens. Is that Miss or Mrs.?

PROSPECTIVE JUROR NO. 9: Mrs.

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THE CLERK: Juror No. 10, William Maloney.

Juror No. 11, Johanna Abraham.

Juror No. 12, Enid Armstrong. Is that Miss or Mrs.?

PROSPECTIVE JUROR NO. 12: Mrs.

THE CLERK: Kindly pay close attention to all questions put to you by the Court.

THE COURT: Ladies and gentlemen, although I would appear to be addressing myself directly to the members of the panel seated in the jury box, I would again admonish you to pay careful attention to all my comments and all my questions as I continue this voir dire examination.

If you are wondering what this case is about, let me try to enlighten you briefly. This is a criminal case which comes before you by reason of an indictment. Two defendants, John Dioguardi and Louis Ostrer, are before you for trial on 28 separate counts or accusations.

Since the defendants have pleaded not guilty to the charges, they thereby raise issues of fact to be tried before a jury.

I will now attempt to give you a brief outline of the indictment, that is to say, the charges which have been presented against these two defendants.

The defendants are charged along with seven co-defendants, who are not on trial here, in a multi-count indictment with violating certain sections of the United States criminal code and the federal securities laws. Twenty-eight counts of that indictment are before you for trial.

The defendants named in the indictment are Anthony Soldano, John Dioguardi, Gary Fredericks, Michael Hellerman, Michael Caricato, Frank or Fred Goodman, Richard Greenberg, Louis Ostrer and Morris Winter.

Count 1 of the indictment charges both defendants with a conspiracy to violate certain federal laws. The primary purpose of the conspiracy, according to the indictment, was to violate laws which prohibit fraud in the purchase and sale of securities by the use of manipulative devices or schemes or other fraudulent business practices.

The indictment alleges that members of this conspiracy purchased all the outstanding shares of the stock of a company called Belmont Franchising Corporation of approximately 28,000 shares at a price of approximately $5 per share. They then caused the price of the stock to rise as high as $42 per share by creating and maintaining an artificial demand for the stock through manipulation of purchases and sales.

It is alleged that the defendant Louis Ostrer agreed to purchase substantial quantities of Belmont stock to help establish and maintain the artificial price for the stock and to convey the false and misleading impression that there was an active market in Belmont stock.

It is alleged that John Dioguardi called and held meetings to resolve disputes between the various defendants and co-conspirators and to decide upon the distribution of the proceeds.

It is also alleged that he shared substantially in the profits.

The conspiracy is also alleged to have intended violations of the federal mail fraud statutes and wire fraud statutes in that the mail and interstate telephone calls were used in furtherance of the manipulative scheme.

The remaining 27 counts which are before you for trial charge the defendants with actual violations of the federal securities laws in 14 counts and the mail fraud statute in 13 counts, all in furtherance of the same manipulative scheme.

Each of these counts charges a specific fraudulent transaction in Belmont stock for which the defendants are said to have been responsible.

Now, as I stated earlier, this is a very bare outline of the indictment, which is prolix and about which considerably more will be said and instructions in great detail will be given to you at an appropriate time.

In reading the indictment to you, I have mentioned the names of many different individuals some of whom are named as defendants and some of whom are named as conspirators but not defendants. Of all these men, only two, Louis Ostrer and John Dioguardi, are on trial. You should not concern yourself with the question of why the other defendants named in the indictment are not on trial here before you, and you should not consider why some of the alleged co-conspirators are named as defendants and others are not. These are not proper matters for your consideration. Your only concern here is with the trial of the two defendants who are before you in court today, and it is only their guilt or innocence which you will eventually be called upon to determine.

You are instructed that the indictment returned by the grand jury is a formal document which the government uses to commence its charge against a defendant and upon which it brings its case into court. The indictment serves no other trial purpose whatsoever. The sole and only purpose of an indictment is to serve as an accusation or a charge which the United States makes against defendants. It serves to inform the defendant of the crimes with which they are charged. It is not evidence against the accused

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and affords no inference of guilt nor does it detract in any degree from the presumption of innocence with which the law surrounds an accused until his guilt is proved beyond a reasonable doubt.

The defendants are presumed to be innocent of any charges against them and the government has the exclusive burden of establishing the defendants' guilt to your satisfaction beyond a reasonable doubt as to each and every element of the counts charged.

At the conclusion of the case, your job will be to determine the guilt or innocence of the defendants. If, based on all the evidence and following the principles of law that I will explain to you at the conclusion of the case, you have a reasonable doubt as to the defendants' guilt, you should not hesitate to return a verdict of acquittal. If, however, based upon all of the evidence and following the principles of law which will be explained to you at the conclusion of the case, you find beyond a reasonable doubt that the law has been violated as charged, you should not hesitate because of sympathy or other reason to render a verdict of guilty.

I shall now turn to a more specific form of inquiry and again I admonish you, at the risk of being repetitious, that you pay very, very close attention.

Does any juror have any mental reservation as to the acceptance of these principles of law?

And I would assume in response to each and every one of my questions that your silence indicates that you do not.

Do you have any preconceived ideas or prejudices that would prevent or hinder you from following the instructions that the Court will give you in greater detail at a later time and the principles of law which have just recently been outlined for you?

Does any juror have any prejudice or bias for or against any point of view concerning the charges summarized for you from the indictment?

Does any juror know or has any juror or member of his family or any associate had any dealings, either directly or indirectly, with the defendants named in the indictment and presently on trial before you or, for that matter, with any member of their families or friends or associates?

These defendants, as I have already stated, are John Dioguardi and Louis Ostrer.

The United States is represented in this case, as it is in all cases brought in this district, by Whitney North Seymour, Jr., United States Attorney for the Southern

District of New York.

Appearing on behalf of Mr. Seymour are Harold F. McGuire, Jr. and S. Andrew Schaffer, both of whom are assistant United States attorneys.

Does any juror know or has any juror or any member of his family or associates had any dealings, either directly or indirectly, any contact of whatsoever manner, with Mr. Seymour or Mr. McGuire or Mr. Schaffer or members of their families?

MR. MC GUIRE: Should we stand, your Honor?

THE COURT: By all means.

MR. MC GUIRE: I am Mr. McGuire.

MR. SCHAFFER: I am Mr. Schaffer.

THE COURT: Indeed, I would ask you if any of you have had any contacts with any member of the United States Attorney's office in any circumstance.

Counsel for the defendant John Dioguardi is Jay Goldberg, and associated with him in this case is Mr. Edward Panzer, both of New York. Counsel for defendant Louis Ostrer is Maurice Edelbaum of New York.

Has any juror or any member of his family or associates had any dealings, either directly or indirectly, with Mr. Goldberg, Mr. Panzer or Mr. Edelbaum or their law firms?

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Does any juror or any member of his family or close friends know or has he or they had any dealings with the following named individuals and corporations:

Anthony Soldano.

Morris Winter.

Richard Greenberg.

Gary Fredericks.

Michael Caricato.

George Drykerman.

Harvey Bertram Pollak.

Matthew Russo.

Michael Hellerman.

Edward Palermo.

Leo Rosenstein.

Murray Levine.

Bruce Halpern.

John Kelsey.

I have been advised that there may be testimony that one of the defendants was known by the name of Johnny Dio. Have any of you heard or read anything about Johnny Dio?

Now, again I assume that by your silence you are indicating a negative response to my questions. Now follow closely the list of names I am about to state before you in addition to those you already heard.

Steven Schoengold.

Anthony DiLorenzo.

William Kilroy.

Walter Tepper.

Lincoln Securities.

Bruce Company.

Hyer & Lowe, Inc.

Barad-Shaff Securities Corporation.

J. M. Kelsey & Company.

Alger Investors, Inc.

American Global Investors.

Eastman Dillon Union Securities & Company.

R. J. Ozol & Company.

Newburger, Loeb & Company.

The stock involved in this case is shares of a corporation called Belmont Franchising Corporation. Has any member of the panel ever been asked to buy stock in this company, or have you heard of Belmont Franchising Corporation in any context at any time?

Has any juror on the panel or members of his or her family ever been employed by the United States Department of Justice or the Securities and Exchange Commission?

Does any juror know or has he or she had any dealings with, either directly or indirectly, anyone employed by the United States Department of Justice or the Securities and Exchange Commission other than dealings ordinarily had by citizens?

Aside from service in the armed forces, has any juror or close relative or close friend every been employed by the United States Government?

PROSPECTIVE JUROR NO. 1: I was with the Air Force during World War II in the Seattle Armed Services office and Office of Price Administration.

THE COURT: What was your total length of service with these agencies?

PROSPECTIVE JUROR NO. 1: About three years.

THE COURT: Is there anything in that employment, which I assume you no longer have, is there anything in that association which would cause you to be prejudiced or favor one side or another?

PROSPECTIVE JUROR NO. 1: No, sir.

THE COURT: Would that detract from your ability to render a fair and impartial verdict?

PROSPECTIVE JUROR NO. 1: No, your Honor.

THE COURT: Is there any other answer to the question?

Does any juror, by virtue of past dealings with

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the United States Government have any bias for or against the government in a criminal case, in a case involving violations of the federal securities laws?

I am now going to ask you relating to your own personal experiences, and I would hope that you not be embarrassed if some of these questions prove to be of a sensitive nature.

Has any juror or relative or close friend ever been charged with a crime or been directly involved in any investigation by a Congressional or state legislative committee or by a federal or state investigative commission, licensing authority, or governmental service or by a federal or state grand jury?

Has any juror or a relative or close friend ever appeared as a witness in any such investigation or in any state or federal trial?

Has any juror or relative or close friend, either as an individual or in the course of his or her business, ever been a party to any legal action or dispute with the United States or any of the officers, agents or employees or have any interest in such legal action or dispute?

Has any member of the panel ever sat as a juror in a criminal case in any court, a civil case, or as a member of a grand jury in this court or any other court?

PROSPECTIVE JUROR NO. 5: State, criminal case.

THE COURT: Where?

PROSPECTIVE JUROR NO. 5: Supreme Court, New York City.

THE COURT: How long ago?

PROSPECTIVE JUROR NO. 5: I would say about two years ago.

THE COURT: Is there anything in that experience which would make it difficult or impossible for you to render a fair and impartial verdict?

PROSPECTIVE JUROR NO. 5: No, I don't think so.

THE COURT: When you say you don't think so, do you have any reservations or do you mean that you do not?

PROSPECTIVE JUROR NO. 5: I do not.

PROSPECTIVE JUROR NO. 9: Last week.

THE COURT: In a criminal case?

PROSPECTIVE JUROR NO. 9: Yes.

THE COURT: How long did that case last?

PROSPECTIVE JUROR NO. 9: Two days.

THE COURT: Briefly, what did the case involve?

PROSPECTIVE JUROR NO. 9: Crossing of guns over state line.

THE COURT: Pardon?

PROSPECTIVE JUROR NO. 9: Crossing guns over state line.

THE COURT: Is there anything in that experience which would cause you to be biased for the government, against the government, for the defendants or against the defendants?

PROSPECTIVE JUROR NO. 9: No.

THE COURT: Has any juror or any member of his family or close friends every been employed as a salesman of securities?

Has any juror ever been employed by a firm which sold securities or gave investment advice or was in some way connected with the sale of securities?

Have the relatives or close friends of any of you jurors worked for such firm?

PROSPECTIVE JUROR NO. 1: My husband is an investment consultant and he was formerly with Standard & Poor.

THE COURT: Is he a registered, licensed investment consultant?

PROSPECTIVE JUROR NO. 1: Yes.

THE COURT: And does he operate individually or under a firm name?

PROSPECTIVE JUROR NO. 1: Individually now.

THE COURT: What is the name of his company?

PROSPECTIVE JUROR NO. 1: He just operates individually. He handles accounts individually.

THE COURT: He handles accounts for investment and gives investment advice?

P. J. NO. 1: Yes, he handles individual accounts.

THE COURT: How long has he been in that occupation?

P. J. NO. 1: He is a former attorney, and he has been doing that since he came out of the army. He practiced law before he went into the army.

THE COURT: Is there anything in his experience which may have rubbed off on you or anything by virtue of his occupation and your knowledge of it and identification with it by virtue of the fact that you are his spouse which would in any way affect your judgment and make it difficult or impossible for you to render a fair and impartial verdict?

P. J. NO. 1: Well, I think perhaps yes, if there is anything that is fraudulent in the stock market.

THE COURT: In other words, do I understand you to say that because this case involves transactions in securities which are alleged to have been in violation of United States laws and the federal securities laws, that because your husband is an investment counsellor, you can't render a fair and impartial verdict?

P. J. NO. 1: I can render a fair verdict.

THE COURT: That is what I want to know. I want to be absolutely convinced. You understand what I am saying?

P. J. NO. 1: Yes, I do.

THE COURT: In other words, do I understand you now to say that your husband's occupation and your husband's employment in the servicing of accounts and the rendering of investment advice would not in any way influence your judgment whatsoever?

P. J. NO. 1: No, sir.

THE COURT: How long has your husband been thus engaged?

P. J. NO. 1: Quite a while. I can't tell you the exact number of years.

THE COURT: Approximately?

P. J. NO. 1: About fifteen years.

THE COURT: For fifteen years?

P. J. NO. 1: At least fifteen years. He operates out of the house. He was formerly employed by Standard & Poor as an account executive.

THE COURT: Where is that?

P. J. NO. 1: Standard & Poor's.

THE COURT: Standard & Poor's?

P. J. NO. 1: Yes, Standard & Poor's.

THE COURT: Where is your husband's office?

P. J. NO. 1: On East 20th Street, in our residence.

THE COURT: Have any of the jurors or their relatives been a member of or employed by a stock exchange firm such as the New York Stock Exchange, the American Stock Exchange, the Commodities Exchange or any exchange in this country or elsewhere?

Have you or any member of your family, and that includes also close friends or any business associates, been the subject of disciplinary proceedings brought by a stock exchange or by the Securities and Exchange Commission?

In my instructions I will charge you eventually with regard to certain statutes adopted to regulate the issuance of and trading in securities. These statutes were adopted to protect the public.

Does any juror have any feeling against these statutes which would prevent you from following my instructions and deciding this case under these statutes?

Does any juror on the panel have any personal prior knowledge of this case or of any of the accusations set forth as I have described them?

Has any juror read in the press or heard on the radio or television or from any other source any information with regard to this case?

Has any past experience of a juror in any way whatsoever caused a juror to doubt his ability to sit as a completely impartial and unbiased trier of the fact?

Ladies and gentlemen, I have tried in these questions to direct your attention to possible reasons you might not be able to sit as a fair juror. Let me now ask you quite apart from any prior questions, does any juror have the slightest doubt in his mind for any reason whatsoever that he would be able to serve conscientiously, fairly and impartially in this case and render a true and just verdict according to the law as it will be explained?

P. J. NO. 10: I was notified a few days ago, your Honor, that I have some problems on my job, and it would be a personal hardship if I had to stay on the case.

THE COURT: That is not the question I asked.

P. J. NO. 10: I am sorry.

THE COURT: Would you have me repeat it?

P. J. NO. 10: Yes.

THE COURT: Let me try it a different way. I am sure you can recognize that even if I sat here until eternity caught up with me and if I had the infinite judgment of our diety I could not possibly be secure that I have covered every possible question which would root out and bring to the surface any possible prejudice which is important to a consideration of this case. I am not unaware that all of us, without exception, are the subject of various conditioning influences that we acquire in life's work and by virtue of experiences which either bruises us or elevates us, but what you are asked to do as jurors is to sublimate any prejudices or any bias which you may have in determining the facts of the case and to accept the law as given you.

So what I am attempting to find out, and essentially this must rely upon your honesty, your good faith andyour willingness to be candid with the Court, what I want to find out is upon an examination of yourselves, can you say that you can sit fairly and impartially in judgment in this case should you ultimately be chosen to serve?

Do you have any doubt whatsoever about your ability to render a fair and impartial verdict upon the facts in evidence and the law to be applied to those facts?

Soul searching is what is necessary at this point because essentially, really regardless of how you answer any questions, the fact of the matter remains that I must appeal to your honesty and your sense of fairness to reveal to the Court any sense or any feeling which might make it difficult or impossible for you to render a fair and impartial verdict.

I shall now continue with very individual questions reaching out to each and every one of you.

You are Mrs. Stein?

P. J. NO. 1: Yes.

THE COURT: What is your residence? I think you said East 20th Street. Would you give me more specifics?

P. J. NO. 1: 510 East 20th Street, Manhattan.

THE COURT: And you are married?

P. J. NO. 1: Yes.

THE COURT: Are you employed?

P. J. NO. 1: Yes, I am.

THE COURT: What is your employment?

P. J. NO. 1: I am an executive secretary in a chemical corporation.

THE COURT: May we have the name?

P. J. NO. 1: Yes. Witco Chemical Corporation.

THE COURT: How long have you been employed by them?

P. J. NO. 1: 21 years.

MR. EDELBAUM: I didn't hear how long.

Daily News.

THE COURT: About what?

P. J. NO. 1: I just remember the name, that he had been associated or accused of being associated with known criminals, and so forth.

THE COURT: Who is that?

P. J. NO. 1: Johnny Dio.

THE COURT: By virtue of what you have read or heard, would that influence your judgment and make it difficult or impossible for you to render a fair and impartial verdict?

P. J. NO. 1: It might.

THE COURT: In other words, you have some doubt about your ability to be impartial?

P. J. NO. 1: Yes, I do.

THE COURT: The Court will excuse you. You may return to the central jury room.

MR. GOLDBERG: While we are up here and it comes at a time when I just had extensive discussion with Mr. Edelbaum and Mr. Panzer, I was troubled by the fact -- perhaps I didn't express it clear enough in my request --

THE COURT: I have no requests.

MR. GOLDBERG: This request of voir dire to the jury.

THE COURT: I thought I read it.

MR. GOLDBERG: You did an excellent job of reading what I submitted, but I thought in view of the fact that so many of the jurors in the last trial, or prospective jurors, heard of this man's name and are sitting -- as we know, it is a common name -- that I had requested that it be asked of each -- I thought I had requested that it be asked of each individual juror, but I can see how looking at it you could have interpeted that it should --

THE COURT: There can be only one interpretation, and I would like to place on the record your specific request.

Request of voir dire to jury, to those in the box: I have been advised that there may be testimony that one of the defendants was known by the name of Johnny Dio. Now, is there anyone who has heard or read anything about Johnny Dio?

MR. GOLDBERG: I mean in the box -- when these other people come in the box, do they get asked that question, too? In other words --

THE COURT: I don't understand.

MR. GOLDBERG: May I reframe it just one more time?

THE COURT: Yes.

MR. GOLDBERG: I had thought or hoped that your Honor would ask each individual member of the jury.

THE COURT: I am not really concerned with what you had hoped or thought. I am only concerned with whether or not my granting of your request, which I did grant specifically, was heeded, and I have no doubt in my mind that I carefully hewed to your request, and I will not hear any more about it.

MR. GOLDBERG: I have not said that you have not adhered to my request. I am taking the responsibility for not framing that request in the way --

THE COURT: What do you want now?

MR. GOLDBERG: Would you consider asking any member who comes into the box as part of your inquiry about their job and employment?

THE COURT: No, I will not. I see no need for it and I think the emphasis is certainly not desirable. Here is a man who came into the box. I did not ask him the question specifically. I asked him generally if he heard my questions and comments and did he have any answer. He immediately came forth and said he read some publicity and came up and told us about his inability to be impartial.

(In open court.)

THE COURT: Are you saying in all good faith and honesty to me that you could render a fair and impartial verdict based on the evidence and the law to be applied?

P. J. NO. 6: Yes, your Honor, but I just remember the name and I am not even sure of how it was connected with any criminal activities or anything. It's just that I remember that name.

THE COURT: Very well.

MR. PANZER: May I make a request --

THE COURT: Mr. Panzer, we have to get some rules of the road here. We can't allow, to use a colloquial expression, everybody in the act. Either you are representing Dioguardi or Mr. Goldberg is. I will not have any more of this, please.

MR. PANZER: Yes, your Honor.

MR. GOLDBERG: May I say something out of the presence of the juror?

THE COURT: Yes.

MR. GOLDBERG: Wouldn't it make a particular problem for us when he read things involving murder? I don't recall seeing it in the newspaper. Doesn't he have to be questioned a bit more closely?

THE COURT: I see no basis for excusing him for excusing him for cause.

MR. GOLDBERG: I didn't ask he be excused for cause. I asked whether --

THE COURT: I will not excuse him sua sponte.

MR. GOLDBERG: My request was would you ask him some additional questions in view of the connection he stated he saw the name.

THE COURT: Yes.

Ask your questions through me, please.

MR. GOLDBERG: May I request he be asked whether in spite of what he has read he could obey your Honor's direction that this defendant is presumed innocent and that the evidence in this case would be the sole source of his decision in this case without regard to what he may or may not have read?

THE COURT: You have heard that?

P. J. NO. 6: Yes.

THE COURT: What is your answer?

P. J. NO. 6: I believe I can make a decision based on the rules and the laws that you read to us and the evidence that is presented to us.

THE COURT: That satisfies me. You may return.

MR. EDELBAUM: May I bring up, so that we don't have to come back again, we are about to approach the last two rounds. One of the jurors had expressed to you his very personal problem of some kind.

THE COURT: I will not excuse him.

MR. EDELBAUM: I would like that further explored because I don't think we should have a juror who suffers some --

THE COURT: You indicate the kind of questions you want. You go back and write them up. If I think they are appropriate I will ask them. If not I will reject them. I think you are on your last round, not the last two.

MR. EDELBAUM: One and one. 10

MR. GOLDBERG: Would you consider, so we don't have to come up again, when you instruct the jury, they are not to discuss the case or any of the principals in the case? What I am concerned about, some of the jurors have mentioned they are familiar with the name. Is there not some instruction you can give not to discuss it with other jurors?

THE COURT: That will come in due course after the jury is sworn and I give them preliminary instructions.

MR. EDELBAUM: It is now a quarter to one. Suppose the jury is not selected.

GW70

THE COURT: The jury is going to be selected.

MR. EDELBAUM: Before we go to lunch?

THE COURT: There will be no intermission until this jury is selected.

MR. EDELBAUM: I am not quarreling.

THE COURT: I am telling you. I think you are all bringing up points that are inopportune. I haven't suspended or recessed this jury. If I should, that would be ample time to call this to my attention.

MR. EDELBAUM: I couldn't read your mind.

THE COURT: You don't have to read my mind, because if I were going to excuse the jury for lunch I would make an announcement, at which point you could have approached me.

(In open court.)

MR. McGUIRE: If I might, your Honor, I think the cards in the board here are reversed. There are two at least that seem to be out of place.

(Clerk and Mr. McGuire confer.)

THE CLERK: William Maloney, you are excused. Report back to Room 109.

Juror No. 10 is now Dorman Youmans.

THE COURT: Mr. Youmans, have you heard my questions and comments?

THE COURT: What are they?

P. J. NO. 10: I lost a lot of money in the stockmarket, and the second, I heard the name --

THE COURT: Let's take the first one. By virtue of the fact you lost a great deal of money in the market, would that in any way influence your verdict?

P. J. NO. 10: I am mad at speculators.

THE COURT: Are you telling me you don't think you could render a fair and impartial verdict?

P. J. NO. 10: I have a doubt.

THE COURT: You are excused.

THE CLERK: Juror No. 10 is now Andrew Yasenovsky.

THE COURT: Yasenovsky, did you hear my questions and my comments?

P. J. NO. 10: Yes.

THE COURT: Do any of those apply to you?

P. J. NO. 10: Well, none of those apply to me but I have one question. You see, I left school when I was nine years old. I was taken to Europe.

THE COURT: You left what?

P. J. NO. 10: I left school when I was nine years old. I was taken to Europe. I do not understand big words. If they are thrown at me I wouldn't know nothing about them.

THE COURT: Do you understand my questions?

Did you understand my comments? Did you understand what I have said and do you understand my comments?

P. J. NO. 10: Yes.

THE COURT: You understood that?

P. J. NO. 10: Yes.

THE COURT: And you can understand what I am saying now?

P. J. NO. 10: Right now, but some words I do not understand.

THE COURT: But have you understood the meaning of what I am said and the meaning of my questions?

P. J. NO. 10: Yes.

THE COURT: I think that is satisfactory. We don't demand that our jurors be college professors or college educators.

How long have you been in this country?

P. J. NO. 10: I came back from Europe in 1930.

THE COURT: Are you employed?

P. J. NO. 10: Yes, sir.

THE COURT: What do you do?

GW75

P. J. NO. 10: I work for the City of Yonkers.

THE COURT: In what capacity?

P. J. NO. 10: I work as a fireman in an incinerator.

THE COURT: What is your occupation that produces your livelihood?

P. J. NO. 10: Incinerator attendant, as far as I know.

THE COURT: Where?

P. J. NO. 10: City of Yonkers.

THE COURT: Do you call that an auxiliary fireman?

P. J. NO. 10: No, we fire the furnaces.

THE COURT: And your auxiliary firemen's job is something in addition?

P. J. NO. 10: No. This is all together. It is the same thing.

THE COURT: How long have you been employed by the City of Yonkers?

P. J. NO. 10: 16 and a half years.

THE COURT: Are you married?

P. J. NO. 10: Yes.

THE COURT: Is your wife employed?

P. J. NO. 10: No, she's at home.

GV76

THE COURT: Do you have any children?

P. J. NO. 10: I have two sons.

THE COURT: How old are they?

P. J. NO. 10: One is 37 and one is 30.

THE COURT: The 37 year-old one, what does he do?

P. J. NO. 10: He is a lieutenant in the Air Force.

THE COURT: Where is he stationed?

P. J. NO. 10: Missouri.

THE COURT: How long has he been in the Air Force?

P. J. NO. 10: 17 years.

THE COURT: And your other son, 30 years of age, what does he do?

P. J. NO. 10: He is a tool and die maker, machinist.

THE COURT: How long has he been employed?

P. J. NO. 10: He has been working since he was 19.

THE COURT: And what is the firm that engages him.

P. J. NO. 10: Pardon?

THE COURT: What firm does he work for?

GW77

P. J. NO. 10: He works for plastics down on White Plans Road.

MR. EDELBAUM: Your Honor, may we approach the bench?

THE COURT: You may.

(At the bench.)

MR. EDELBAUM: Your Honor, I respectfully challenge this juror for cause and I ask the privilege of trying to challenge by having the juror come up to the side bar so I can interrogate him further as the basis for my challenge.

THE COURT: I will listen to the question you want to ask and I will do the interrogation if I think it is proper.

MR. EDELBAUM: I would like your Honor to ask this juror further his education.

THE COURT: He has already indicated that it is minimal.

MR. EDELBAUM: I ask your Honor to ask this juror if he reads, what he reads. I ask your Honor to ask this juror, when you read the indictment to him or the substance of the indictment, did he understand or comprehend what that was all about.

I ask your Honor to ask him if he has ever engaged in any kind of stock transactions, does he have the slightest idea of stock transactions, because in view of this juror's statement to your Honor that he couldn't understand certain words, I don't think we should have that type of juror in a complicated stock fraud case as we have here with all of the exhibits and everything. I think we should have an intelligent juror.

THE COURT: What do you think?

MR. McGUIRE: I may say I share Mr. Edelbaum's view.

THE COURT: Rather than go through?

MR. GOLDBERG: You want my position? I will do whatever you think is appropriate, but I -- the kind of questions Mr. Edelbaum has in mind you never ask nor would it have been proper to ask other jurors.

THE COURT: Yes, and I am not sure Mr. Edelbaum could answer affirmatively the questions he asks I ask of this juror. You don't understand every word, do you, necessarily?

MR. EDELBAUM: About the stock market, thank God, no.

(In open court.)

THE COURT: We will excuse you, Mr. Yasenovsky.

THE CLERK: Juror No. 10 is now Doris Shields.

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P. J. NO. 8: I don't know if it might. Perhaps it would.

THE COURT: Thank you, you are excused.

THE CLERK: Juror No. 8 is now Geneva Rush. Is it Miss or Mrs.?

P. J. NO. 8: Miss.

THE COURT: Are you employed, Miss Rush?

P. J. NO. 8: Yes, I am. I work for Flower Fifth Avenue Hospital and I am a patient attendant and I assist the nurse with her work in giving medication.

THE COURT: How long have you been so employed?

P. J. NO. 8: A full year.

THE COURT: Have you heard my questions and comments?

P. J. NO. 8: Yes, I did.

THE COURT: Did you understand them?

P. J. NO. 8: Yes, I did.

THE COURT: Do any of those apply to you?

P. J. NO. 8: One does. Back in 1944 I was employed for the Navy Department and this was in Cleveland, Ohio.

THE COURT: What kind of work did you do for them ?

P. J. NO. 8: I was assigned in the cleaning department.

THE COURT: In what?

P. J. NO. 8: The cleaning department. And I was like an assistant to the foreman in helping seeing that the office was cleaned.

THE COURT: How long have you been employed by Flower Fifth Avenue?

P. J. NO. 8: Four years.

THE COURT: What did you do before that?

P. J. NO. 8: I was a silk finisher in a cleaning shop up in the Bronx.

THE COURT: Where do you live?

P. J. NO. 8: 521 West 152nd Street.

THE CLERK: Miss Walls, you are excused.

Juror No. 11 is now Clark Blackburn.

THE COURT: Mr. Blackburn, have you heard my questions and comments?

P. J. NO. 11: Yes, sir.

THE COURT: Do any of those apply to you?

P. J. NO. 11: I have served on civil cases in Westchester County.

THE COURT: What kind of cases?

P. J. NO. 11: Mostly automobile accident cases.

GW36

P. J. NO. 11: Yes, your Honor.

THE COURT: Where do you live?

P. J. NO. 11: Croton-on-Hudson.

13 THE COURT: 17 Arlington Avenue?

P. J. NO. 11: Yes.

THE COURT: Are you employed?

P. J. NO. 11: Yes, New York Telephone Company, repairman, 26 years.

THE COURT: White Plains?

P. J. NO. 11: Peekskill area.

THE COURT: Your wife employed?

P. J. NO. 11: Yes. She works for readers Digest as a check verifier.

THE COURT: Do you have any children?

P. J. NO. 11: Two; a daughter just graduated from college and a son 18. The daughter is 21.

THE COURT: Is she employed now?

P. J. NO. 11: No, she is looking. She is an elementary school teacher. My son just got out of high school and he is working as a plumber's helper.

MR. McGUIRE: The Government waives its last challenge, your Honor.

THE COURT: Jury satisfactory?

MR. GOLDBERG: Satisfactory to the defendant

Dioguardi.

MR. EDELBAUM: Satisfactory to the defendant Ostrer.

MR. McGUIRE: Satisfactory.

THE CLERK: Alternate Juror No. 1, Gabriel Solow.

Alternate Juror No. 2, Hannah Bradley.

Miss or Mrs.?

PROSPECTIVE ALTERNATE JUROR NO. 2: Miss.

THE CLERK: Alternate Juror No. 3, Gasper Filecinno.

Alternate Juror No. 4, Catalina Sachnovsky.

Miss or Mrs.?

P. A. J. NO. 4: Mrs.

THE CLERK: Alternate Juror No. 5, Max Stavis.

Alternate Juror No. 6, Emil Kirali.

THE COURT: You pronounce your name Solow?

P. A. J. NO. 1: Yes.

THE COURT: Did you hear my questions and comments?

P. A. J. NO. 1: Yes, your Honor.

THE COURT: Do any of those apply to you?

P. A. J. NO. 1: Yes, I recognize two names.

THE COURT: Would that in any way influence

THE COURT: Are the alternates satisfactory?

MR. McGUIRE: Satisfactory, your Honor.

THE COURT: Are the alternates satisfactory?

MR. EDELBAUM: Yes, your Honor.

MR. GOLDBERG: Yes, your Honor.

(A jury was duly impaneled, sworn and affirmed.)

(Six alternate jurors were duly impaneled and sworn.)

8 THE COURT: The remainder of the panel may now go to lunch and then I would ask you to return to the central jury room for any further instructions that the jury clerk may have for you.

I would like the record very definitely and clearly to indicate my deep gratitude to you. I think all of you have been just very patient and very considerate in a very unrestful situation. You have just been wonderful, and I want you to know I am grateful to you.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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                                   :
UNITED STATES OF AMERICA,
                                   :
          vs.
                                   :
JOHN DIOGUARDI and                          71 Cr. 558
LOUIS OSTRER,                      :

                     Defendants.   :

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Before:

HON. DAVID N. EDELSTEIN,

District Judge.

January 4, 1973
11:00 a.m.

APPEARANCES:

WHITNEY NORTH SEYMOUR, JR., ESQ.,
United States Attorney,
BY: HAROLD F. MC GUIRE, ESQ., and
S. ANDREW SCHAFFER, ESQ., Assistant United States Attorneys.

JAY GOLDBERG, ESQ. and
EDWARD PANZER, ESQ., Attorneys for defendant John Dioguardi

MAURICE EDELBAUM, ESQ.,
Attorney for defendant Louis Ostrer.

(A jury was duly impaneled and sworn)

(Six alternate jurors were sworn)

THE COURT: Ladies and gentlemen, we will soon break for lunch, and thereafter, upon your return, the trial will begin with opening statements by counsel which will serve to outline what each expects the evidence at the trial to be.

This will be followed by the taking of evidence from witnesses. After all the evidence is in counsel will again have an opportunity to address you. We lawyers call this summation, and that is for the purpose of bringing to your attention the evidence that has been adduced and after summation is closed the Court will instruct you on the law.

Until the time comes for you to deliberate on this case, it is your solemn obligation and your swor duty not to discuss this case among yourselves or with others or permit others to speak to you about the case. Any violation of an instruction by the Court invites ver serious possible advantages. So I would ask you to please dwell heavily on all my instructions and all my admonitions. This admonition about not discussing the case with others includes, of course, discussions even with members of your own family and friends.

I am not unaware that there is always a temptation or a desire to review what has happened in your life during the course of [illegible] day. Please under no circumstances yield to a [illegible] temptation. I repeat, you are not to discuss this case under any circumstances with anybody among yourselves, members of your family or friends. Anybody means just everybody.

Now, if any person should attempt to communicate with you or to talk to you about this case, and the Court has no anticipation that anybody will, again it is your solemn duty and obligation, and you have taken an oath to observe the instructions of the Court, to report this promptly to the Court in private and immediately.

Similarly, you are admonished and instructed not to read or listen to any reports of this case which may be published or broadcast in the news media. If you should by accident read or hear any such report, you must report that to the Court in private.

Now, I would suggest that the safest possible way of implementing my admonition, and I know that this is going to be a sacrifice, but the entire service of justice requires some sacrifice, so I would ask you and

I instruct you to forego the listening to any news broadcasts either by radio or television. We are going to try to move this trial along very expeditiously. It s my plan, depending upon my ability to get you to agree to it, because I don't want to impose any undue or unnecessary burdens. We have enough burdens in the norma course of affairs. But my plan would be to try this case every day starting at 9:30 and terminating the day a 4:30.

Now, how does that appeal to you?

On occasion I may hold you over a little past 4:30. On occasions I may call you earlier than 9:30. And then on occasions it may be 9:30 but you will always be aware of my schedule as you go along.

JUROR NO. 9: I have company coming from out of town tomorrow night.

THE COURT: You will be out by 4:30.

JUROR NO. 9: I don't know when my sister-in law is coming.

THE COURT: You will have to make arrangements for her to get in because I will keep you until 4:30.

JUROR NO. 9: I will try to make some arrangements.

THE COURT: Please do that. I would be most grateful to you.

JUROR NO. 9: I will.

THE COURT: Is there anything unclear about what I have said?

Thank you. We'll have our lunch now. I know it is quite late. It is one of the hardships we have to endure. Will an hour be sufficient?

THE JURORS: Yes.

THE COURT: I will expect you back at 3 o'clock.

The clerk will show you exactly where you go. This is going to be good for your diet.

THE CLERK: The court stands in luncheon recess until 3 o'clock.

MR. GOLDBERG: May I make an application?

THE COURT: Sure.

(In the robing room)

MR. GOLDBERG: Your Honor, the defendant Dioguardi is on a restricted diet and he asked me to inquire of the Court whether he could have his lunch brought in from the outside.

THE COURT: I see no way of complying with tha request.

MR. GOLDBERG: I have no other requests.

(Luncheon recess)

AFTERNOON SESSION

3:00 p.m.

(Jury in box.)

THE CLERK: Mr. Mc Guire, are you ready to proceed?

MR. MC GUIRE: Yes, I am, your Honor.

May it please the Court, members of the jury, my name is Harold Mc Guire. I am going to be, along with Mr. Andrew Schaffer and Mr. Meyer Goldman, from the Securities and Exchange Commission, who is seated at the counsel table with me, representing the government during the course of this trial.

It always strikes me as an awesome thing to appear before an American jury, and it strikes me as a particular privilege to appear before this jury and before this Honorable Court. As you may know, Judge Edelstein is the Chief Judge of the busiest court, the busiest federal court in the entire country.

As a prosecutor, I suppose the question I have been asked most often is, "Why don't they do something about the guys behind the scenes." I would like to have a nickel for every time I have been asked that question.

MR. EDELBAUM: Your Honor, I object to this.

This is not an opening.

THE COURT: Objection sustained.

MR. MC GUIRE: This case, ladies and gentlemen, is about the guys behind the scenes. This case is the story of a stock manipulation. The defendants on trial, so the evidence will show, are two out of a group of five individuals behind the scenes who ran a stock manipulation and financed it. All five of this group behind the scenes were private citizens, private individuals, none of whom had any apparent connection with a brokerage firm or a brokerage house or with the stockmarket itself. Accordingly, none of these five individuals, including the two defendants, Dioguardi and Ostrer, here on trial, appears very often on the stockmarket's records, some of which will be introduced in evidence and which we expect to show will reflect the manipulative transactions which are at the heart of this case.

Since, as I have suggested, this case involves joint action, the defendants are charged with conspiracy, which means for you and me nothing more than joint action to further a criminal purpose. And the criminal purpose which the government and the grand jury have charged in this case is stock manipulation.

The defendants, in addition, are also charged with a number of what we call substantive counts. These are individual crimes, individual criminal acts, and each one of the individual criminal acts which the defendants are charged with involve a purchase or a sale of stock in a company calle Belmont Franchising Corporation. It is the prosecution's contention here that those purchases and sales of stock were rigged purchases and sales and that they were done to further the manipulative scheme.

For the most part, the evidence will not show that either of the defendants on trial executed any of those manipu lative trades. As I said, it is the government's theory tha these defendants were the men behind the scenes, and it is ou theory that they were responsible for these trades, although they did not perform them themselves, because they were membe of the group, the inside group of five people that directed the manipulation.

Now, before I get into a detailed explanation of what the government expects to prove during the course of this trial, I think it might be helpful to you if I reviewed with some of you and perhaps told some of you for the first time what the evidence will show with respect to certain technical terms that you will hear during the course of the trial.

The first I have said, that this was a stock manipulation, and some of you may not be entirely clear on exactly what stock is.

As the evidence will show, stockis simply shares of ownership in a corporation, in a business, and a corporation is simply a form of doing business.

If you own a share of stock in a business, why, you own a share of the onwership of the corporation. Now, the particular corporation that we are going to be talking about is called Belmont Franchising Corporation.

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The evidence will show that that was a small, for all practical purposes, a worthless company. It had virtually no business, it had virtually no ongoing value, the book value of its stock, that is, the value of the shares in the assets of the business amounted to somewhere between three and ten pennies per share; but during the course of the scheme which will unfold during this trial the price of stock in Belmont Franchising Corporation rose from an arbitrary beginning price of $5 per share to a maximum of $42 per share.

This was done on what is known as the over-the-counter stockmarket. Now, I am sure all of you have heard of the New York Stock Exchange and the American Stock Exchange, and I am sure that you know that those are places where stock is bought and sold. In fact, they are places where there is an organized marketplace. There are buyers and there are sellers of stock in lots of different companies that operate on the floor of the New York and American Stock Exchange, taking orders from branch offices all around the country.

This stock, Belmont Franchising Corporation stock, was not traded on either the New York Stock Exchange or the American Stock Exchange or any other stock exchange. It was traded on what is called the over-the-counter market, and the way stock is bought and sold on the over-the-counter market is something entirely different. There is no organized scheme, there is no organized trading floor where there are buyers and sellers whom you can expect to find at a given location. In the over-the-counter market, stock is bought and sold between brokers who communicate with each other, primarily by telephone.

So let's suppose that you own 100 shares of Belmont Franchising Corporation stock and you go to your broker and you say, "I want to sell that stock." What happens is really very simple. Your broker calls up another broker on the telephone and he says, "I have a hundred shares of Belmont Franchising Corporation stock fo sale. Are you willing to buy it?"

Now, the conversation takes very sophisticated forms. They talk in shorthand among each other as people who are used to talking the same kind of deal all day long are inclined to do. But that is the kind of conversation that takes place. One broker is a buyer of stock and another broker is a seller of stock and they communicate with each other and they arrive at a price by negotiation over the telephone.

Now, that concept lies at the very root of this case, and if there is any juror here who doesn't understand it or who wants it explained once again or more fully I think maybe we ought to stop right now and go over it because it's vitally important for you to understand the evidence in this case that you understand that that's the way the over-the-counter market works.

Now, there are some documents which are created as a matter of course during trading of stock on the over-the-counter market. They are documents which the Securities and Exchange Commission regulations require to be kept for all trades in stock. And the evidence will show that even though the transactions in Belmont Franchising Corporation stock were manipulated from start to finish, nonetheless the brokers who were involved in trading this stock back and forth kept the records that they were supposed to keep in pretty much the normal course of business to create a camouflage, if you will, that everything was going according to Hoyle. I would like to familiarize you, if I might, with the kind of documents that these brokers kept.

MR. GOLDBERG: I object to the exhibition of documents which are not in evidence.

THE COURT: Objection sustained.

MR. MC GUIRE: Very well, your Honor. I

will attempt to describe to you ladies and gentlemen what the documents of the kind that were kept by brokers during the Belmont manipulation were all about. I am a little handicapped because I can't --

MR. GOLDBERG: I object to that, your Honor.

THE COURT: Objection sustained.

MR. MC GUIRE: The documents that I am referring to are mainly two different kinds of documents. One is called an order ticket, and you will see, I reckon, lots of order tickets during the course of the proof in this trial. An order ticket is nothing more than a piece of paper on which a broker, having obtained information from his client, from his customer, writes on a form the directions which his customer has given him.

In the instance we spoke of before, the broker who is going to sell your 100 shares of Belmont Franchising Corporation stock will write on a form "Sell 100 shares Belmont Franchising for the account of customer" and you put in your name in the blank.

The order tickets are in a variety of different forms, but they all contain certain essential information, and during the course of his negotiation with the broker on the otherside of the transaction your broker will put down the price at which he sold the stock, the name of the other broker and so forth.

Now, another kind of document that is created regularly during the course of operations of this kind on the over-the-counter market is a document called a confirmation. This again is required. And a confirmation is another form which the regulations require a broker who has completed a trade to send to his customer. So, for example, after you have successfully sold your 100 shares of Belmont Franchising Corporation stock you can expect to receive in the mail the next day a confirmation from your broker which says "On today's date we have sold for your account 100 shares of Belmont Franchising Corporation stock" and it gives the price and the tax and the broker's commission and details of that kind.

You will see a number of confirmations during the course of the evidence in this case, and, in fact, the substantive counts of the indictment, which I spoke of earlier, the fraud counts of the indictment, all charge the defendants, directly or indirectly, with causing the mailing of various confirmations in the course of Belmont Franchising Corporation trading. And it is the use of the federal mails which makes this a federal case, which gives this Court jurisdiction.

Now, to go back to our hypothetical sale of stock by you, when you sell stock you are, of course, required to furnish the stock to the broker so that he can complete the transaction. That means that you are required to furnish to your broker the physical stock certificates which presumably you own when you tell your broker to sell stock in the first place. You are not required to deliver those certificates to your broker on the very same day that you have your telephone conversation with him telling your broker to sell. The day on which you call your broker on the telephone is what is known in the trade as the trade date -- the trade date.

So if on January 4, 1973, you call your broker and he makes a sale of stock over the telephone for you, January 4, 1973, is the trade date. But the date on which you are required to furnish the stock to your broker so that he can complete the details of the transaction is a number of days thereafter, and that date is called the supplement date.

When you are buying stock instead of selling stock, in the normal course it is the supplement date, which is some days after the trade date, when you are required to pay for it, that is, when you are required to have the cash or check or whatever it is in your broker's hands, and you will hear from some of the witnesses in this case the terms trade date and supplement date. Remember, the trade date is the day when the brokers agree to the transaction; the supplement date is the date when payment is due.

One other thing I ought to tell you before we move on to the guts of the case, and that is that brokers have to have a way of knowing who is going to be on the other side when they are trading over-the-counter in securities. It doesn't come to a broker by some divine revelation that he should call another particular broker and find out that he has 100 shares of Belmont Franchising Corporation or any other stock to buy or sell. There is a publication which circulates in the brokerage fraternity daily in which brokers who wish to buy or sell a particular kind of stock advertise their intentions, and that publication is called the pink sheets -- the pink sheets.

In the pink sheets each day there is a listing of brokers who are willing to buy a certain stock and brokers who are willing to sell a certain stock and that is one of the primary ways in which brokers who are anxious to conduct trades in a given over-the-counter stock get together with each other, because the pink sheets also contain their telephone numbers. Enough about the mechanics.

I referred to Belmont Franchising Corporation. The evidence will show that was a company incorporated sometime in 1968. In 1969, that company obtained permission from the Securities and Exchange Commission, which is an agency of the federal government, to market its stock to the public. That permission was obtained as a matter of course by filing with the Securities and Exchange Commissic certain documents which I suppose you will see, documents called, among other things, an offering circular which describe the company, describe its assets and its worth, state in some little details what the company expects to dc with the proceeds when it sells stock to the public. And such a document was filed with the Securities and Exchange Commission and it came to pass that the Belmont Franchising Corporation was enabled to sell stock to the public for a period beginning in, if memory serves, March of 1969, and ending in December of 1969.

This public offering of stock was rather unsuccessful but during the course of the offering some 28,000 more or less shares of stock were sold. You will hear at least one witness describe that those shares of stock were primarily sold to a person who controlled them all, in effect, that it wasn't a real public offering of stock but something of a sham because one person and not the general public wound up controlling the whole 28,000 shares.

And you will hear a witness by the name of Fred Goodman, one of the five insiders in this case, describe how he was able to collar that entire group of 28,000 shares and put it under his control by buying it from the man who previously controlled it at the price of $5 a share.

Now, you might ask why in the world pay $5 a share for the stock in a company that had a book value, a net worth, of somewhere between three and ten cents a share. The evidence should show to you ladies and gentlemen that the primary value of this stock was its value to professional manipulators. 28,000 shares of stock is a small enough number so that it can be readily controlled, and the technique that you will hear described by many witnesses is the technique of having the entire box, so-called, of 28,000-odd shares under the control of the same small group of people who in order to drive the price up -- and remember the prices are advertised in the pink sheets -- in order to drive the price up traded small amounts of this stock back and forth among each other. It's just as if we had among us a bushel of oranges --

MR. EDELBAUM: Your Honor, I think the government is required to tell them what they expect to prove, not to go into examples at this stage.

THE COURT: I will allow it.

MR. MC GUIRE: Thank you,your Honor.

It's just as if we had among us a bushel of oranges and each one of us, let's say, had four oranges and we were all in cahoots to drive up the price of oranges So I take one orange, and we bought the bushel, let's say, for $2 and there are 50 oranges in the bushel so that is four cents an orange. I take one orange and I well it to Mr. Foreman for five cents. Mr. Foreman turns around and sells it to the lady behind him for six cents, the lady sells it to the gentleman over here for nine cents and the price keeps getting driven up but we all have the same bushel of oranges in our joint possession and when the price, when the published price of oranges, or in this case stock, gets to $42 a share, our plan -- our plan -- is to pay crooked brokers to take it all off our hands at $42 a share, to pay crooked brokers to do that and to put it in the hands of innocent investors at the price of $42 a share. That's the kind of manipulation that the evidence is going to show in this case.

I told you the name of Fred Goodman. Fred Goodman I have described as one of the five insiders in the back of the deal. Chronologically he was one of the first.

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He made the original contact with the owner of the 28,000 shares. The names of the other individuals who are in the inner circle in this manipulation are Micha Hellerman, a name you will hear a great deal of, Anthony Soldano, John Dioguardi and Louis Ostrer.

The evidence will show I think graphically enough what roles these individuals had during the course of the manipulation. But I would like to comment just briefly on what we believe the evidence will show with respect to Dioguardi's role and to Ostrer's role.

The structure of the manipulation was that Goodmar together with his partner, Soldano, by the same sort of process that I have described to you, passing the one orange back and forth among all the jurors, would drive the price of Belmont Franchising stock from $5, the price at which they acquired the whole bushel, to $15 per share, and they would do it by precisely this sort of series of purchases and sales. The evidence will show that they were able to do it in the period from March 4th through March 6th, 1970, and during those three days the published and actual price of Belmont Franchising, Inc. stock went from 5 to $15 per share.

Now, what are Goodman and Soldano to do with this stock once they have gottten the price to $15 per share? At that point by pre-arrangement a new cast of characters comes in, and the new cast of characters is principally Michael Hellerman and a man who the evidence will show was his partner, and that is the defendant Ostrer. Their function was to take the entire bushel of stock off the hands of Goodman and Soldano and their various nominees who controlled it all at a price of $15 per share, that is, they were to buy the whole works, and the evidence will show that they, in fact, did buy the whole works. The arrangement between Hellerman, on the one hand, and Goodman and Soldano on the other, was that the $10 profit on each of stock that Goodman and Soldano made by raising the price from 5 to 15, that $10 profit was to be split 50-50, $5 to the Goodman and Soldano side of the deal, $5 to the Hellerman side of the deal, and Hellerman, in turn, arranged to pay right off the top a goodly portion of his share to the defendant Dioguardi.

The evidence will show that he did that. Ostrer, as I said, was Hellerman's partner. His function was to provide the financing to purchase a good deal of the stock, approximately half of it, at the price of $15 per share. A little multiplication will show you that 28,000 shares at $15 per share is a good deal of money, and Hellerman, who was the guiding spirit behind this manipulation. was not able

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to raise all that money himself. Hence, the defendant Ostrer comes into the picture.

The evidence will show that Ostrer committed himself to take approximately half of the 28,000 shares in return for a guarantee from Hellerman that Hellerman would absorb any losses that occurred in further trading of the stock, and Ostrer would have to split half his profits with Hellerman.

For that kind of iron-clad deal and in contemplation of having the stock ultimately taken off his hands at a much higher price, by virtue of bribing brokers to put it into the hands of innocent investors Ostrer anticipated a very handsome profit.

However, flaws began to sneak into the plan. The first flaw was that Ostrer wasn't able to come up with the money that he said he would be able to come up with to buy stock at $15 per share. And so while you will see that orders were put in Ostrer's name to buy approximately 14,000 share of stock, when the settlement day rolled around the brokers were still looking for their money, and there will be a good deal of evidence about what sort of retrenching had to be done in order to supply money to cover Ostrer's contracts; you will see checks bounced all over the place, you will see loans being made, you will see shadowy figures nmbr 4

in the background supplying money in cash.

Eventually, by approximately the end of March the negotiations had settled down and the entire 28,000 share of stock at $15 a share was paid for.

Am I going a little too fast for some of you? I think --

MR. GOLDBERG: I object to providing comments.

THE COURT: I don't think we need that sort of comment.

MR. MC GUIRE: I apologize, your Honor. I meant no offense.

THE COURT: If I think you are going too fast I will call it to your attention.

MR. Mc GUIRE: Thank you, sir.

From the time that Hellerman and Ostrer had control of the entire block of Belmont stock at $15 per share, for approximately the next month the same sort of process as I have described earlier began all over again, and from the end of March through the end of April the price rose stadily as trades were made, very few in number, between brokers, and the price started to go from $15 to $17 to 19, to 23, to 27, to 28, and eventually to $42 per share. During that period Ostrer was able to sell off some of his stock, and by so doing, by selling it off at a handsome profit, to pay back some of the moneys that had been advanced to him.

But on April 30th and May 1, 1[illegible], a new and much more serious flaw crept into the plans. During our entire discussion here we had been working on the assumption that there were only 28,000 shares of stock in this company and that the conspirators controlled it and that by controlling all of it they were able to drive the price up from $5 to $42 per share in the period between early March and the end of April. But at the end of April came a great surprise. New stock began to appear on the market, stock that the conspirators knew nothing about, and somebody, it turned out, was successfully able to sell Belmont Franchising Corporation stock, genuine Belmont Franchising stock into the market at prices above $35 a share.

A little multiplication again will show that to absorb a thousand or two thousand shares of stock at those prices would have cost the manipulators much, if not all of their profits, and they didn't know how much there was, they didn't know how much stock they had to absorb. It turned out that the president of Belmont Franchising Corporation, who had nothing to do with the manipulation at all, who, as far as the evidence will show, knew nothing about it, had some private stock in his own hands. Now, this

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was not stock that had been registered to sell to the public, but this man, whose name is Rosenstein, obtained permission to sell it privately on the over-the-counter market, and as a result of his being able to do that and to throw stock in thousand share lots into the faces of the conspirators, the conspiracy came to a pretty grinding halt, and just like musical chairs, it ultimately left those who held the stock in possession of it and unable to sell it.

Once this new stock from Mr. Rosenstein had appeared upon the market, all of a sudden nobody was willing to buy or sell Belmont Franchising stock at all.

The reason for it is pretty simple. After all, every trade, every purchase and every sale of Belmont Franchising, Inc. stock up to that point had been rigged and manipulated, and when a sale appeared that was not manipulated, that was not rigged, that the conspirators knew nothing about, why, that dried up the whole scheme pretty quickly.

This, of course, caused loss, financial loss among the members of the conspiracy. They were all mad; they were all sore, they were all looking around at each other, and the evidence will show this, to see who was responsible and who should bear the loss and who should obtain what profits had been made during the course of the manipulation.

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The evidence will show that the man they came to as an arbiter of these disputes, who had been kept informed of the progress of the scheme and had been called upon for advice and consultation throughout the whole operation and who, of course, had gotten a very large sum of money towards the beginning of it, was the defendant Dioguardi.

Now, what I have attempted to give you here is a bare outline of what the evidence in this case will show. There will be quite a few witnesses testifying from the witness stand over there. You will see a number of exhibits An exhibit is just a fancy word for a piece of paper with a court mark on it. You will see a number of exhibits in evidence. You will have a chance to examine them. And what I tell you, needless to say, is not evidence in the case at all; it is simply intended as a guide for you, so you will understand the evidence as it does come in.

The reason I am allowed to do that, the reason I am allowed to give you this sort of road map is the nature of the proof itself in a criminal case. Each witness you see has to tell his whole story from the witness stand at one time, and during the course of a criminal trial it would be extraordinary to find any single witness who knew the whol story of what went on. They have to tell what they know, but they know only fragments. We will do our best to try and present the evidence in an understandable fashion. But you will have to realize and bear with us because of our inherent limitations.

The first witness that gets on the stand is only going to be able to tell what he knew of what went on in a certain period of time, and then the next witness will tell what he knew as to what went on in that period of time. They will be viewing the scene from different perspectives. They don't all see all of it.

So you will have to wait until substantially all of the evidence is in to get a good idea, a complete idea of what went on. For that reason I know you will pay careful attention, although some of the evidence may appear to be either without significance or dull and dry to you as it comes in. We have done one thing to try and help you along. I spoke of Exhibits, pieces of paper. There will be a number of order tickets offered as exhibits. There will be a number of confirmations offered as exhibits; there will be a number of other documents offered as exhibits; and we have taken the liberty of marking those exhibits with numbers from 1 through a hundred and something in as nearly a chronological order as we could, so that the first exhibit is dated some time in 1969. That is Exhibit No. 1. And the last exhibit, which is numbered a hundred and something, is dated in May of 1970, when the scheme blew up. And the other exhibits are numbered in as close as we could arrive in chronological sequence in between. We have done that because we think it may be helpful to you in organizing the proof. I suggest to you that you try your best when the witness has testified to remember the basic dates on which the events that they testified to occurred. There are some that I would like to leave with you.

For example, the first stage of the manipulation occurred between March 4th and March 6th, 1970. Ostrer and Hellerman put in orders to purchase the entire 28,000 shares at $15 a share on March 9 through March 11th. It took several weeks after that for the fracas to settle down about how the stock was going to be paid for at $15 a share, and the upward move in the price from 15 to its ultimate high of 42, and then back down a little bit occurred from approximately the 1st of April through the first two weeks in May, after which there was no more trading in the stock. If you remember those dates, I think you will find it a lot easier to put a significance on the evidence as it comes in.

Now, of course, all of the government witnesses will be cross examined, and I may say to you that they will be cross examined by experts --

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MR. EDELBAUM: Your Honor, I don't think we have to have this.

THE COURT: That comment is objectionable and unnecessary.

MR. McGUIRE: I don't know quite how to withdraw it, your Honor.

THE COURT: Just don't repeat it. I don't think there should be colloquy.

MR. GOLDBERG: I object to the added statement.

THE COURT: You know the rules and I will ask you to observe them.

MR. GOLDBERG: I will, your Honor.

MR. McGUIRE: I am sorry. May I proceed?

THE COURT: Yes, but refrain from comments, whether they be of a flattering nature or otherwise.

MR. McGUIRE: Very well, your Honor.

The main government witnesses, as I have indicated to you, were participants in the conspiracy, participants themselves. They knew what was going on, and the only reason tha they are able to come here and tell you about it is they did know what was going on. To some greater or lesser extent they were in the "know" themselves.

Now, ladies and gentlemen, if they were participants in the conspiracy that makes them, of course, guilty of a crime, if they were knowing participants in this conspiracy.

MR. EDELBAUM: I object to that.

THE COURT: That is objectionable. That is no proper opening.

MR. MC GUIRE: In dealing with witnesses of thi sort, ladies and gentlemen, I am sure it will be your own good sense to take what they have to say with a grain of salt

MR. EDELBAUM: Your Honor, I object to this. This is the same thing.

THE COURT: That is objectionable, and, Mr. Mc Guire, now I caution you not to repeat the same indiscretion. This is not a proper opening, as you may very well be aware

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MR. MC GUIRE: I am sorry, your Honor. I am trying to get a point in here and I think I am doing it in artistically.

THE COURT: I am not sure; I rather suspect that you may be attempting to do it too artistically.

MR. MC GUIRE: I humbly apologize to the Court.

THE COURT: Let's not have any more.

MR. MC GUIRE: The point I am trying to get at, ladies and gentlemen, I would like to direct your attention particularly to the corroboration, the corroborative evidence in this case. I am sure you know what corroboration means. When one person says something and another person who hasn't had an opportunity to consult with him says the same thing, the two things are corroborative of each other.

MR. EDELBAUM: Your Honor, that is objectionable. I am sorry I have to interrupt.

THE COURT: Mr. Edelbaum, don't be sorry. Your objection is proper. That, again, is objectionable. It's not an opening statement. I didn't think at this stage of your career that I would have to outline the proper limits of an opening statement. An opening statement, as I have already mentioned and observed earlier, is expressly limited to the opportunity given to counsel to present to the jurors a view of the evidence that is going to be produced for their consideration. Characterizations are verboten; there is no place for those in an opening statement. And when you speak of corroboration, that is a term of art, and, again, that is not proper in an opening.

Now, please confine yourself to an opening statement, sir.

MR. MC GUIRE: Very well, your Honor.

THE COURT: This is more by way of summation, not opening.

MR. MC GUIRE: I am sorry.

Ladies and gentlemen, there will be a number of witnesses, there will be a number of documents. We do expect that the stories told by the witnesses and the documents will dove-tail with each other. If we don't, you may certainl hold the government to account.

Thank you.

MR. GOLDBERG: Chief Judge Edelstein, counsel for the government, and Mr. Edelbaum, Mr. Panzer, Mr. Foreman and ladies and gentlemen of the jury: My name is Jay Goldberg. I speak, along with Mr. Panzer, who will be associated with me, for only one of the defendants that you see seated at the far table -- I speak for John Dioguardi. And before I tell you what I expect that the evidence in this case will show, I want you to recognize a couple of introduc or matters that the Court touched on in the discussion that it had with you when it selected the jury or conducted the voir dire, and that is that the indictment in this case, which contains the charges, is merely the accusation by whic all defendants in this courthouse, those who are guilty and those who are innocent, are brought to trial.

But it is your function, as we outline the evidenc , as you follow the testimony as it comes in on the witness stand, it will be your function, and yours alone, to decide the question of guilt or innocence, for even the learned Cou t has no role with respect to the facts of this case. As the Court observed in many ways, you are the supreme judges of the facts.

Now, the defendant Dioguardi in response to the indictment pleaded not guilty. By that plea he told each and every one of you that he is innocent of each and every one of these charges. And, in addition, under the law as we go along throughout this trial you will recognize that even though I stand here to tell you what the evidence in this case will show, no defendant under our system need make any opening statement through counsel, no defendant need offer any proof, because it is the burden of only one person in this courtroom to offer any proof and to offer any evidence, and that is the prosecutor, because throughout this trial the defendant sits protected by the presumption of innocence, and the burden is on the one who would tear down that presumptionto present to you honest, credible, reliable proof, convince you, if he can, by proof beyond a reasonable doubt that my client, John Dioguardi, is guilty of the charges contained in the indictment.

And by his plea of not guilty John Dioguardi says such proof does not exist, by his plea he tells you that he is innocent.

Any time I make an opening statement and outline to you what I expect the evidence in this case will show, I try to do my best at the beginning of the trial to reassure a jury, the jurors, that this will not be a difficul task and sort of give them the confidence that it is not going to be all that difficult to decide a particular matter before them. But I can't in good conscience do that here, because the proof in this case will show that many of the transactions that deal with the complicated securities laws of the United States, and his Honor will instruct you on these laws at the time of the Court's charge to the jury. So that you are going to be dealing with a rather difficult area of the law that requires you to pay careful attention to the evidence and the documents as they come in. It's not going to be a simple asault case; it's going to be a rather complex case.

5 The second factor is that there are a number of charges. I believe the Court indicated that this was a multiple count indictment. I think that was the Court's language and there are perhaps in excess of 25 counts in this indictment. You have before you two defendants.

Now, the temptation, of course, as the evidence comes in will be to lump the two defendants together.

THE COURT: I am afraid that this is not proper opening, Mr. Goldberg. We got to be even-handed about this.

MR. GOLDBERG: I am sorry. I will desist.

I want you as the proof comes in to recognize that before you there will be, in effect, two trials, two defendants who will be on trial before you and about whom the question of their guilt or innocence will be something that you will have to resolve, that these defendants do not stand united in interest, they do not stand or fall together, and you will have to consider the guilt or innocence of each of them separately and not give into the idea of just lumping them together.

Now, another difficulty in this case is that -- I am sure I speak for allcounsel when I say this -- the verdict in this case is to be arrived at the end of the trial free from any emtoion.

THE COURT: I am afraid you are getting into an area which is not within your province. This is not proper opening. Wouldyou please reserve the instructions on the law for the Court?

MR. GOLDBERG: I want you as the proof comes in to recognize that the defendant Johnny Dioguardi is entitled to your consideration of the evidence free from any emotion or prejudice that might inure by reason of anyone having heard of the name Johnny Dioguardi or Johnny Dio; and the defendant is to be tried in this case based on the evidence in this courtroom and nothing more or less, and I am sure the Court will dwell on your obligations as jurors at greater length. But we are here asking for a decision based upon the evidence in this case free from any prejudice or emotion.

Now, as to the proof in this case, the proof will show that the stock of Belmont Franchising Corporation was manipulated. It may come as a surprise that on that point there will be no disagreement between the prosecutor and myself. But the stock will be shown to have been manipulated by a group of six or seven professional stock manipulators, people who are expert not only at manipulating stock, but who are expert at lying, conning and cheating the public, people like yourselves, and these people, the proof will show, were led by Michael Hellerman, Anthony Soldano, Fred Goodman, Steven Schoengold, Jack Kelsey, Morris Winter and Matthew Russo, and, additionally, Edward Palermo. You will learn that these seven or eight people whose names I just gave you set out to artificially stimulate a demand for a worthless stock, push that stock up far beyond its legitimate value were the market not manipulated.

So on the central point whether the stock of Belmont Franchising was manipulated or not, you will find no disagreement between Mr. Mc Guire and myself, speaking solely for John Dioguardi.

You will find that the architect of this plan, Michael Hellerman, the proof will show this in graphic detail, wasn't only a professional at manipulating stocks, this stock and countless other stocks, but he was an exper the proof will show, at manipulating and trading upon friendships that he made, names that he may have used in an effort or at a time when he thought by the use of droppin a name or the technique of dropping a name it could suit his purpose.

The proof will show that in addition to Michael Hellerman being a stock swindler,along with Kelsey, Schoengold, Palermo, Russo, Goodman, that they were also con men when it came to relationships with their fellow man and the people with whom they dealt on a 1-to-1 basis. In short the proof is going to show that Michael Hellerman, the architect of this stock manipulation, Belmont Franchising, struck up friendships with people in all walks of life, hoping to trade upon the claim that certain people were partners or that he was connected with certain people; the proof will show that he was a clever name dropper and that he threw the names of people around as easily as he threw around his claims about the value of a particular worthless stock that he was pushing.

The proof will show that this inner group of stock manipulators, far greater in number than the five referred to by Mr. Mc Guire and different in its membershi than the people mentioned to you by Mr. McGuire, were high-pitch salesmen; their weapon, the proof will show, was not violence or force; their weapon was their mouth.

If there is anything, the proof will show, that characterize the professional stock manipulator, it was his gift of gab and his ability to sell and his ability to con or flim-flam people, and it is by that technique, the proof will show, that people were caused to suffer loss. But these people who manipulated the stock of Belmont Franchisin Corporation, these people who Mr. McGuire has referred to as professional stock manipulators, the names that we agree upon, Michael Hellerman, Fred Goodman, and the other names that I have added, will come before you shortly and try their biggest con job, their phoniest deal, where the stakes for them are much higher than money.

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The proof will show that these professional stock manipulators will shortly attempt to squirm out from under the threat of punishment by the government for crimes they committed in a case that will deal with their stealing, their cheating and their lying by falsely accusing someone else whom they believe the government may be interested in prosecuting.

In other words, the proof will show that these people will be here to sell not a stock, they will be here to sell not to people on the stock market or the over-the-counter trading market, but they will be here to sell you ladies and gentlemen of the jury, and you are going to have to ask yourselves, I am sure, as they testify, "Would I hesitate to purchase a stock from Fred Goodman? Would I hesitate to invest in something that Michael Hellerman told me was a good deal? Jack Kelsey? Or Steven Schoengold?" I will speak to you later in summation about what the import of that would mean if you would hesitate to take their words in a stock deal, what you should do about taking their words in a matter as important as this, where people's rights are concerned in a trial before you.

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The issue will be whether you are going to buy their product, their story. The proof is going to show to you, ladies and gentlemen, that Michael Hellerman, Steven Schoengold, Fred Goodman, Kelsey and Winter, and I repeat these names so you become familiar with them, because their names will come up in this trial constantly, the proof is going to show that these people have cheated the public for years in numerous stock deals, and the proof will show they lied and stole and cheated not only from the public but from each other, from relatives, from friends.

When the proof comes in, you are going to recognize, as you hear this inner circle of stock swindlers testify in an attempt to squirm out of their misconduct, you are going to come to the conclusion that no act of misconduct was too great for them, no conduct was too low for them.

THE COURT: That isn't proper, sir.

MR. GOLDBERG: I am sorry, sir.

THE COURT: I don't want to continue to caution you, sir.

MR. GOLDBERG: I am coming to the conclusion, your Honor, and I will do my best to observe your Honor's direction.

The proof may very well take a week or two to present, but if this be a lengthy trial, a trial that goes beyond several days, you will come to the conclusion that this is a trial that will outline in graphic detail the misconduct of this inner group of stock swindlers about whom I have just mentioned

And the proof will expose to you, and I might say by background, you recall Mr. McGuire outlining for you the method by which the stockmarket works or the over-the-counter trading market works.

I want to outline for you, if I may, as you hear the inner group of stock swindlers testify, I want to outline to you what the proof will show is the workings, the techniques of a professional stock swindler so you will be able to recognize that as you see it in the same way that you recognize things dealing with the stock market. In line with Mr. McGuire's effort to lay bare before you the workings of the stock market I want to suggest to you the proof will show in graphic detail that the professional stock swindler, whether it be Michael Hellerman or Steven Schoengold or Jack Kelsey, used three steps. The proof will support what I say, thatthe first step that Michael Hellerman used was one that recognized that his word was sorth very little and that if he was to be accepted by other stock swindlers he had to latch on or falsely claim that he was connected with someone; and the proof will show he resorted, Michael Hellerman did, to a number of techniques in an effort to convince his own conspirators, the people who were within the inner circle in this stock swindle that he was connected with Johnny Dio. If Johnny Dio moved to Queens, the proof will show Michael Hellerman bought a home nearby in Queens.

The proof will show that if John Dioguardi's son had a business on 28th Street in Manhattan and gave up the lease, the proof will show that Michael Hellerman quickly moved in to take over thatlease so that he could tell people, "You know whose place of business this used to be? Johnny Dio. I'm with Johnny Dio."

That gave Michael Hellerman, the proof will show, strength to convince his co-conspirators thatthere was someone in the deal whose word could be trusted.

The second step, the proof will show, as a pattern of behavior of a professional stock swindler, is he had to cultivate the person who he was setting up.

The proof will show that if he was seen in a restaurant or he knew that John Dioguardi went to a restaurant and he wanted to convince a cohort, a co-conspirator, that he was connected with Johnny Dio, he would take, the proof will show, that co-conspirator to a restaurant and have that co-conspirator sit at the bar while he walked over to the table and had some conversation with Dioguardi and then came back and said, "See who I was talking to? That is Johnny Dio. He said this and thus and so."

Now, the third step and final step characteristic of the five or six or seven professional stock swindlers that I have placed in the inner circle is the technique utilized by those who have spent a lifetime and a career in manipulating stock, the safety or escape hatch to freedom. The proof will show that these people got together and realized that when the bundle had burst, when the deal had fallen through as outlined by Mr. McGuire and when the government moved in to prosecute, the simplest technique was utilized by these stock swindlers to insure their own freedom, and that was to place the blame on someone else and to secure from the government leniency for themselves. It's not only the best method but it's an elementary method going back to childhood. When someone is caught --

THE COURT: That's improper.

MR. GOLDBERG: I say to you, ladies and

gentlemen, when a witness testifies inthis case I suggest to you to carefully recognize whether this witness is testifying with any hope of reward or whether he is testifying freely without any expectation for favorable agreement at the hends of the government.

THE COURT: That is improper, too, sir. I don't think I am going to continue to warn you about this much longer. I am not delaing with freshmen recently out of law school.

MR. GOLDBERG: I'll conclude in just a couple of minutes and suggest to you that when the proof comes in, the proof will demonstrate that this inner circle of professional stock swindlers represent a group of people whose word cannot be trusted --

THE COURT: That is improper comment, too, as you very well know. That is not an opening statement.

MR. GOLDBERG: I told you that there will be no dispute whether the stock of Belmont Franchising was manipulated. What will be the key issue in this case is whether the defendant John Dioguardi has any responsibility for that manipulation or whether you are dealing with a bunch --

THE COURT: That is improper, too. I wish you would refrain from this type of statement.

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MR. GOLDBERG: Well, I will ask you, then, in conclusion, to recognize, as the proof comes in, what may have motivated the testimony.

THE COURT: That is improper.

MR. GOLDBERG: I will ask you to be fair and impartial, listen attentatively to the evidence --

THE COURT: That is improper, too. This Court has already instructed abundantly on the issue of fairness and evenhandedness, integrity and impartiality. I am afraid you are using your opening statement for a purpose for which it was not intended.

Now, please desist from this sort of practice.

MR. GOLDBERG: I suggest to you that when the proof comes in there will be a total absence of any reliability --

THE COURT: That is improper and I am not going to caution you again, sir.

MR. GOLDBERG: I will conclude, your Honor, by saying to this jury that when they have heard the evidence I am sure they will entertain a reasonable doubt which will require them to return a not guilty verdict.

THE COURT: And that is improper also. And as to every statement which this Court has characterized as being improper I want you to remove it completely and absolutely from your mind, but completely. It serves no useful purpose for this Court to sustain an objection or ask that something be stricken from the record or to suggest that a comment is impropre if you consider it.

Now, opening statements are by no means of an evidentiary nature. They have no evidentiary value. They have no probative force on the issue of guilt or innocence. An opening statement has a very clearly defined purpose that a very young law student learns at an early stage. It is supposed to be an opportunity for counsel, if they accept it, to outline what the evidence will show, not to comment on the law, not to draw inferences. Perhaps that is better reserved for another opportunity.

Mr. Edelbaum, I will hear from you.

MR. EDELBAUM: May it please this honorable Court, Mr. McGuire, Mr. Schaffer, Mr. Goldberg, Mr. Foreman, ladies and gentlemen of this jury:

I am going to be very brief. My name is Maurice Edelbaum and I represent the gentleman sitting at the end of the table whose name is Louis Ostrer. I only represent him and my remarks will be concerning what the proof is expected to show about him and nobody else.

Ladies and gentlemen, we will prove that the architect of this entire case was Michael Hellerman. We will prove that he set my cleint up and made a sucker out of him, as they say in the vernacular. We will prove that my client didn't make one single penny out of any single transaction. We will prove that he lost $120,000 or became responsible for the loss of $120,000 and wound up with 8500 shares of stock worthless that he has at the present time that isn't worth the paper that this is written on.

And how was it done? We'll show you that before Mr. Ostrer bought certain stock just a very few months before he met Mr. Michael Hellerman at a restaurant called Ponti's Restaurant which is here on the west side of New York down near Canal Street, and that Mr. Hellerman approached by my client who he knew had been a specialist in obtaining life insurance in difficult cases. And Hellerman told him he had a problem because of his weight, which was somewhere in the neighborhood of 250 pounds. And we will show you that Mr. Ostrer referred him to somebody about the insurance, and to his amazement he learned that Hellerman wanted to buy a million dollar life insurance policy. We'll show you that that was a very large policy with a very large premium with a very large commission.

We'll show you that Hellerman drove around with a car and a chauffeur. We'll show you that one day Hellerman asked Mr. Ostrer to meet him at the Israel Discount Bank to impress him and there he introduced him to various officers of the bank and he was held out as a very large client of the bank because his mother had enormous certificates of deposit with the bank. And it was at that time that Hellerman asked Ostrer if he would like to be interested in buying not this stock, Belmont, but a stock called Tabby's International which later turned out to be another manipulated stock by Mr. Hellerman and his group.

And Ostrer told him that he didn't have the money and he didn't buy it. And how was he set up? In a week or so we'll show you the stock went almost double and Ostrer hadn't bought it and he ate his heart out, we'll show you.

And then Hellerman came to him and suggested to him that he should buy Belmont at 15. We'll show you that Ostrer never was engaged in the securities business in his life, never had anything to do with any of those manipulators, didn't know them, didn't know them at all.

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And when Ostrer told him he didn't have the money, the so-called big partner, didn't have the money, he said he would help him get the money, he would advance it to him because Ostrer was approaching some of his friends to go into this transaction hoping to make some money, this so-called tip on the market.

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The proof will show that he never attended any meetings with any of these conspirators, and all I ask you to do in this case is to keep your minds open, listen to the direct testimony which you should consider and also the cross examination which you should consider, and then make up your minds as to the guilt or innocence of my client after yo have heard the whole story in this case, and I am satisfied when you have done that you will do what is proper in this case.

Thank you.

THE COURT: Ladies and gentlemen, we will suspend for today. You have the Court's gratitude for having been so indulgent, a long morning, delayed lunch, fairly late afternoon. Tomorrow morning we will commence again at 9:30.

I want you to keep my admonition very clearly in mind. I want to remind you of your obligation and your oath and I want to repeat once again that any violation of this Court's instructions would seriously invite the risk of stringent sanctions. So if you have no questions at this point, I bid you goodnight and see you tomorrow morning at 9:30.

THE CLERK: Kindly remain seated until the jury leaves the courtroom.

Court is adjourned until tomorrow morning at 9:30.

(Jury leaves courtroom.)

THE COURT: At all times during the course of the trial, counsel and the witnesses will all remain seated in the courtroom until such times as the jury has adjourned and has left the floor. That may involve a delay of approximately ten minutes on each occasion when an adjournment is performed, but I think I would ask you heed this admonition. There are two affidavits which have been furnished to this Court, one by Mr. Ostrer and one by Mr. Dioguardi, and they will be marked as court's exhibits.

(Court's Exhibits 1 and 2 were marked.)

THE COURT: Will you see that the jury has departed.

(Adjournment taken to Friday, January 5, 1973, at 9:30 a.m.)

United States of America

v. 71 Cr. 558

John Dioguardi and Louis Ostrer

New York, January 5, 1973
9:45 a.m.

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(Trial resumed.)

(In robing room with all counsel and defendants present.)

THE COURT: Who requested this conference?

MR. MC GUIRE: I did, your Honor.

If the Court please, I have a couple of things to put on the record.

First, I would like to inform the Court that I was quite ill last night, and I respectfully request the Court to hold recesses today so that I might gather myself together. I had quite a high fever and some very unpleasant symptoms. I think I can make it through the day all right but I would appreciate a morning and an afternoon recess.

THE COURT: As soon as you feel the need for a recess will you please indicate that to me either by raising your hand or just requesting it, and a recess will be granted.

MR. MC GUIRE: Thank you, sir.

Secondly, your Honor has asked us to prepare, and we have prepared, a proposed order concerning the medical examination of the government's proposed witness Kelsey and we are submitting that proposed order for the Court's perusal. I might add that we have made arrangements for Mr. Kelsey to travel to New York to be examined by a physician this next week. If the physician's report indicates that he would be caused severe medical problems as a result of the strain of testifying before a Court and a jury, then, as the Court knows, we will make appropriate application to have his deposition taken.

Thirdly, I have furnished to counsel this morning Government Exhibits for identification 3517, 3518, 3519, 3520, 3521 and 3522, all of which relate to the witness Fred Goodman. I would be happy to identify those documents further for the record if it seems necessary. But I think counsel will acknowledge having received the papers.

I might also add that I made those documents available last evening, and counsel did not avail themselves of the opportunity to use them. I did adhere to our usual policy of asking counsel not to take any such material out of the courthouse, and it is my understanding that the Court will ask counsel to adhere to that policy.

THE COURT: I have already indicated that.

MR. EDELBAUM: May I be heard on that?

THE COURT: Surely.

MR. EDELBAUM: Your Honor, last night when court recessed shortly after 4:30 we offered these and I refused to remain in the courthouse and take the time to do that because of physical reasons. At the end of a whole day to sit in this courtroom with the facilities here at the desk and spend the time necessary, an hour, an hour and a half that it wouldtake to peruse these properly is a physical impossibility.

In every other case I have tried in this courthouse, the Judge, despite the rule in the United States Attorney's office, has taken on the record the assurances of counsel, who are officers of the court, that no copies would be made of the material, that the material would be only for counsel's purpose in preparation, and I have had the opportunity to take them home. I believe in the other trial before Judge Knapp the material was taken over the weekend, and that was permitted by the Judge despite the fact that Mr. Mc Guire had told him about the rule of the United States Attorney's office. We are officers of the court --

MR. MC GUIRE: That is not quite correct.

MR. EDELBAUM: Let me finish.

-- as officers of the court we make a representation, and I think the government should take it. This is not a case of trying to see how strong we are physically. And besides that, Judge, I have a law office and I must get back for at least 20 minutes after a long day. My office is at 230 Park Avenue. There are all kinds of reasons. I can't spend a day here and then more, and I don't want to die in this courthouse because the government does not want to give us this material and we have to remain here. The only alternative is we will have to have a recess when the material is given to us so we will have the opportunity to examine the material. I don't think there should be any requirement that we have to remain here at night after a full day in court and a very arduous day down in the well of the courtroom to do this when we can do it leisurely at home and in the comfort of my home and take care of it.

I worked until 1 o'clock this morning at home. I was here at 9 o'clock, as I am every morning. I am always the first lawyer in the courtroom. Mr. Mc Guire said he would give it to me at 9 o'clock this morning, but, unfortunately, he was ill and he was not here at that time. But I don't think we should have this problem.

What is the problem with taking it home? What are we going to do with it, Judge?

THE COURT: We will find out in a moment.

MR. MC GUIRE: Your Honor, Mr. Edelbaum's statement about what happened in the trial before Judge Knapp is not quite correct. The government offered in that case, and repeats the offer here, to allow counsel to take with him any material which we furnished to counsel which is of public record. We do not, however, wish to allow grand jury testimony and confidential memoranda to go out of the courthouse.

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Now, in this case material of this kind, grand jury testimony and confidential memoranda is not voluminous. At the most for any witness it might amount to 25 or 30 page , and I don't mean single space typewritten pages, pages of transcript or pages of notes. In the case of no witness is it an imposition or a burden or a terribly time-consuming proposition to read that material in the courthouse?

The reason for our office policy, as your Honor knows, is that the last thing in the world that we want to do is to make ad hominem about what lawyers are likely to do with the material. That would be a disgrace and a terrible thing to have to do. But it has been our sad experience that material of this kind taken out of the courthou and furnished to lawyershas unfortunately in too many instances turned up in unauthorized places. That is the reas n for our policy.

THE COURT: Would you identify it for the record those documents marked for identification which you have placed in the category of being confidential? One such document that you mentioned is the transcript of the grand jury testimony?

MR. MC GUIRE: Yes.

THE COURT: Which you say consists of about 30 pages?

MR. MC GUIRE: In the case of the witness Goodman, for example, there is no grand jury testimony at all. The bulk of the material that we have furnished to counsel in the case of the witness Goodman consisting of a good many hundred pages is testimony of previous trials. We, of course, have no objection to allowing that matter to go out of the courthouse. The remainder of the material that we furnish to counsel with respect to this particular witness is my notes, and my notes consist of approximately 15 pages handwritten and usually double spaced.

MR. EDELBAUM: With respect to those notes, what is so confidential after we have them? We read them. They have lost their confidential status after we have them. All right, about the grand jury testimony, there may be a question. But what about the other material?

THE COURT: I am trying to find out what the other material is.

MR. EDELBAUM: I would be happy to show it to you.

THE COURT: I don't think that is going to serve a useful purpose if we get a description of it. The first description that you have given me concerns the grand jury minutes, and I think that should be kept right here in the courthouse.

Now, the other consists of your notes?

MR. MC GUIRE: Yes.

THE COURT: And that is some 15 pages of it?

MR. MC GUIRE: No more for any witness.

THE COURT: How many documents do we have in sum? What is the total of these documents that you do not wish to leave this courthouse? What are they? How many grand jury transcripts do you have?

MR. MC GUIRE: Well, do you mean for the entire trial, your Honor, or for each witness? It is a little hard to say.

THE COURT: In order to make a determination I gotto understand what is the volume of work that Mr. Edelbaum and Mr. Goldberg would be faced with if they are not permitte to take them out of the courtroom. I just can't tell any more.

MR. Mc GUIRE: The government expects to call in the neighborhood of 15 witnesses at this trial, give or take a few. Of those witnesses, probably 10 have testified before the grand jury, and in no case that I am aware of is the grand jury testimony of any of those witnesses more than 50 pages long.

MR. EDELBAUM: 50?

MR. McGUIRE: Yes. In addition to that there are transcripts with respect to some of those witnesses of appearances before the Securities and Exchange Commission. Those transcripts tend to run a little longer, and it was our offer before Judge Knapp, and it continues to be our offer now, to allow that matter to be taken from the courthouse if need be.

MR. EDELBAUM: What matter is that?

MR. MC GUIRE: Transcripts of appearances before the Securities and Exchange Commission.

THE COURT: I still don't think I can estimate the volume of work that would be required to be accomplished here in this courthouse based upon your resistance to having all of these documents taken out.

MR. MC GUIRE: I can give you an estimate.

THE COURT: Do so.

MR. MC GUIRE: My guess would be that in no case would it require more than an hour's time.

THE COURT: Each day?

MR. MC GUIRE: Yes, each day to thoroughly perus that material which the government resists having taken out of the courthouse.

THE COURT: Well, let's see if we can approach it from a slightly different tack.

Is it my recollection that at an earlier conference you indicated that the witnesses you were going to call were between 12 and 20, and you consider four major and crucial? Is that correct?

MR. MC GUIRE: That would be roughly right.

THE COURT: Well, if it is roughly right, is it more right to say 5 than 4?

MR. MC GUIRE: We have a special problem, as you know, with the witness Kelsey.

THE COURT: Yes, I know. Without Kelsey it is four and with Kelsey it is five?

MR. MC GUIRE: I would say so.

THE COURT: Would it meet with your approval if all the documents which you resist being taken out of the courthouse concerning these four or five witnesses be perused in the courtroom, and as to the others, that those documents be permitted to be taken back to the office?

MR. MC GUIRE: Well, as to the others, frankly, I don't think there is much of a problem at all, because if there is any 3500 material with respect to them, it is of such slight volume that perusing it any place would not take more than a few minutes.

THE COURT: In any event, as to those that you do not consider crucial witnesses I can see no objection to counsel taking all of the documents marked for identification back to their office or their home to study at their convenience.

MR. MC GUIRE: May I have a moment to consult?

(Pause.)

MR. MC GUIRE: Mr. Schaffer has reminded me that although there are a couple of witnesses who we would not consider major substantive witnesses, they did testify before the grand jury at rather short length and we would strenuously resist turning over the transcript of that material.

THE COURT: Tell me your crucial witnesses.

MR. MC GUIRE: The names of them, your Honor?

THE COURT: Yes.

MR. MC GUIRE: With every respect, sir, in this case the government would respectfully decline to do that.

THE COURT: Well, if I instruct you to turn over all the material as to those witnesses you do not consider crucial, by the simple process of elimination counsel would know the witnesses that you do consider crucial? Isn't that so?

MR. Mc GUIRE: The government does not wish to identify the names of its witnesses at all.

THE COURT: You are aware of that?

MR. MC GUIRE: Oh, yes.

MR. EDELBAUM: That doesn't necessarily follow, because Mr. Hellerman has been a big problem; whether they are going to call him or not is a big mystery. So we still wouldn't know and we are waiting with bated breath to find out.

MR. GOLDBERG: Your Honor, is it true there is this policy, becasue I have been here a rather long time and I never encountered this so-called policy, and I have been through a couple of these stock fraud cases. I will take Mr. Mc Guire's word, but I have never been confronted by this statement that there is this policy. Mr. Wing, who is head of the fraud unit in the Imperial case made the material available before Judge Pierce and Judge Lasker.

THE COURT: I don't think this serves any useful purpose. Let us assume there has not been a policy until yesterday; it now becomes a policy.

MR. EDELBAUM: Judge, you are the person who can direct the turnover; it is in the discretion of the Court to move this trial along with expediency, and the only wa it can be moved along with expediency is that counsel no interrupt proceedings during the day to examine 3500 mater which ordinarily is turned over at the end of the direct examination of a witness.

MR. Mc GUIRE: With every respect, sir, that ki of argument in this situation is quite unfair. The gover ment has not indicated that it wants to turn over material at the time specified by the letter of the statute. We could insist on that.

MR. EDELBAUM: I didn't say that.

THE COURT: Don't go into unnecessary argument. I quite understand your argument of expediency, but you have something else in your logic balance sheet. Expediency has to be measured and considered in terms of what is prudent, and I am trying to reach some accommodation. And so my instruction is that as to all the witnesses that you do no consider crucial, that all documents be turned over, with the exception of the grand jury minutes, which you have indicated as to those witnesses they are not unnecessarily prolix or prolonged.

As to the four or five crucial witnesses, you will turn over only those documents which you do not consider confidential, and as to the others, they will be examined in the courtroom.

MR. EDELBAUM: May we have a direction to Mr. Mc Guire that that material be furnished a day in advance at 9 o'clock in the morning in the courtroom so we don't have to spend the time here to examine it after an exhausting day in the courtroom?

THE COURT: I think that is a fair and reasonabl request. I think they should be turned over at 9 o'clock, and speaking of accommodation, I want you to know that I have turned aside my own practice and am adjourning every day at 4:30, and I am not happy about it.

MR. EDELBAUM: I am not quarreling with your Honor.

THE COURT: I know, but my usual time to adjourn would be between 5 and 5:30. So you have that time of approximately half an hour to an hour a day. I want to move this trial along as quickly as I can. But I also want to consider your problems as well as the District Attorney's problems, and I will continue to do that to the best of my ability.

MR. EDELBAUM: I am sure that you will.

THE COURT: Is there anything else? If not, we will continue in the courtroom.

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United States of America

v.

71 Cr. 558

John Dioguardi and Louis Ostrer

New York, January 8, 1973
9:30 a.m.

- - -

(Trial resumed.)

(In the robing room.)

THE COURT: I understand Mr. Ostrer and Mr. Dioguardi are not here. Do they waive their presence?

MR. EDELBAUM: Yes.

MR. GOLDBERG: Yes.

I read the minutes over and I think I jumped too quickly. It is not as bad as I thought. Mr. Mc Guire was correct. It would be strained reasoning to give it the interpretation I first thought. However, I do think it's a good idea to keep in mind that we listen to your Honor's suggestion to be cautious with the government witnesses who have testified in both in Imperial and in this case should they get Dioguardi into this situation.

THE COURT: I have indicated more than a cautionary note to Mr. Mc Guire. I insist he be careful when he interviews his witnesses to make sure that he impresses upon them the need for eliminating in their answers any conclusions or references or statements concerning other transactions of other cases, and I am sure you are aware of the necessity and importance of that.

MR. Mc GUIRE: It goes without saying.

MR. GOLDBERG: But, your Honor, so that there is no confusion, on cross examination there are different principles that apply with respect to my raising of other transactions with witnesses such as Goodman. Of course, I intend to go into his hopes and expectations on that open sentence of Imperial. But that doesn't at all open the door to whether Diguardi is a part of the Imperial transaction, because I intend, of course, since the Imperial case is still open vis-a-vis Goodman to explore the question of bias and motive. So I will touch on other transactions, but, of course, be very careful not to open the door to anything that would justify Mr. McGuire coming back and saying, "Well, Diojuardi told me to do this."

THE COURT: As I understand your statement now, it is to the effect that on cross examination you want to explore other indictments and other matters on which sentence may be pending for the purpose of showing motivation and bias and the influence that it might have on his state of mind to testify in a manner favorable to the government?

MR. GOLDBERG: That is a correct statement of my position.

MR. MC GUIRE: I guess it would be an understatement, your Honor, to say that I had thought of that before. Your Honor may recall that I tried to touch on the subject in my opening statement, and your Honor cautioned me quite properly to stay away from it. But I am ready for the barrage. I am watching for an opening of the door.

THE COURT: By barrage I suppose you mean you do not intend to be caught unaware?

MR. MC GUIRE: Yes.

MR. GOLDBERG: Will we after the witness testified be advised of all those pending matters, not only open sentences, but matters of which Goodman is the subject of investigation by the government? In the last case I brought out when I made that motion before your Honor the prosecutor read off from a yellow foolscap those matters that the defendant Goodman or the witness Goodman was under investigation for and he followed that procedure with respect to other government witnesses, so that there might be situations where I might not know of an open investigation and would, therefore, call upon Mr. Mc Guire at the conclusion of his direct to make known any open investigations with respect to this witness.

MR. MC GUIRE: On that account, your Honor, we might be engaging in an exercise of futility, since Mr. Goodman has testified now four or five times in the courthouse, and the subject has been ventilated thoroughly each time. To put a very short end to the discussion, I don't know of any open investigations that have not been mentioned in those appearances.

MR. GOLDBERG: Tha is satisfactory. I am satisfied, your Honor, that Mr. Mc Guire will do what is required

THE COURT: Very well. All we have to do is wait for the jury to arrive.

MR. SCHAFFER: Your Honor, at this time the government will furnish defense counsel and the Court with copies of its requests to charge.

MR. EDELBAUM: Just a few.

THE COURT: It is not quite an inch.

I am aware, Mr. Edelbaum, and you, too, Mr. Goldberg, that you have indicated that you do not wish to submit any requests to charge, but I would ask you to submit your contentions.

MR. EDELBAUM: Yes, your Honor.

MR. GOLDBERG: As far as we know them. If your Honor recalls, Mr. Mc Guire was hesitant about furnishing the names of his witnesses, his key witnesses. To that extent I have some problem in preparing contentions.

THE COURT: Prepare them tentatively

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MR. GOLDBERG: People like Goodman and Schoengold, who will be witnesses here, who testified in the other cases, I can do that.

MR. EDELBAUM: My contention, I think, was pretty clearly set forth in the five-minute opening that I made.

THE COURT: I would prefer if you gave it to me in writing.

A good deal of this is boiler plate?

MR. MC GUIRE: Yes.

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(In the robing room)

MR. EDELBAUM: I always wondered why the government or anybody else would give a judge of your experience boilerplate.

THE COURT: I have insisted on it.

MR. MC GUIRE: We have also gone over some of the standard language and made some adaptations for purposes of clarity.

THE COURT: The reason should be obvious. There is no man who is always so acutely in possession of his senses that he can't hit a blind spot and omit something. It can happen.

(Discussion off the record)

(In open court; jury present)

THE COURT: Good morning, ladies and gentlemen.

MR. MC GUIRE: Mr. Schaffer has asked me to inform the Court and jury that another judge in the courthouse has required his presence for some time this morning. In fact, it is an order to go to trial in another case. He has asked to be excused so that he can straighten that matter out.

THE COURT: Very well.

FRED GOODMAN resumed.

A I can assume; I can put this whole thing together.

THE COURT: You are being asked about your knowledge.

THE WITNESS: No, I didn't know.

MR. EDELBAUM: Thank you, your Honor.

MR. MC GUIRE: Nothing further.

THE COURT: Any further questions?

MR. GOLDBERG: No, your Honor.

THE COURT: Step down, please.

(Witness excused.)

THE COURT: Call your next witness.

MR. MC GUIRE: The government calls Michael Hellerman. If we may, it may take a few minutes to have him come into the courtroom. Perhaps this might be an appropriate time for a recess.

MR. EDELBAUM: May we see your Honor at the side bar?

THE COURT: We will take a brief recess, ladies and gentlemen. You may return to the jury room.

(Jury excused.)

(In the robing room.)

MR. EDELBAUM: Your Honor, the first thing I wanted to ask you, how late does your Honor plan to sit today? I ask that for only one reason, I have a commitment

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before Judge Pierce to appear at 4:30. If your Honor plans to sit later, would you be good enough to have one of your law clerks advise Judge Pierce about this? Nobody else can take care of it, because it is a sentence in which I am involved with a client.

THE COURT: I will call Judge Pierce and I will [illegible] his indulgence until 5 o'clock.

MR. GOLDBERG: I know this is touching on a subject that your Honor cautioned me not to go into too much, but when Mr. Mc Guire said it would take some time to bring the witness up into the courtroom, may I ask whether we are going to have some sort of armed camp atmosphere in the court? Are there going to be three or four people sitting in front of him as a shield? I am concerned about the way it will look.

MR. MC GUIRE: Hellerman is a prisoner in custody, and I take it that proper precautions to guard a prisoner in custody won't surprise anybody. So I think there is no reason for any alarm in connection with courtroom precautions. I take it it will come up very quickly that Hellerman is a prisoner in custody, and that should relieve Mr. Goldberg of any burdens in that regard.

THE COURT: In any event, my technique of dealing with the matter is to have Mr. Hellerman placed in the witness chair and the marshals to take their position wherever they ordinarily do to keep him under surveillance, and that is to take place before the jury is placed in the box.

MR. MC GUIRE: That is why I asked for the recess.

MR. EDELBAUM: And the other $64 question is there should be some material with respect to Hellerman.

MR. MC GUIRE: Some 3500 material. It is exceedingly brief; it consists of notes in my handwriting and will be made available.

MR. EDELBAUM: Didn't he testify before a grand jury?

MR. MC GUIRE: No.

MR. GOLDBERG: How about my material?

MR.MC GUIRE: I have compiled a number of matters in which Mr. Hellerman has been involved and certain documents in which he has been named and I propose to furnish that to Mr. Goldberg at the end of our session today. If there is anything missing I am sure Mr. Goldberg and I can work it out.

MR. EDELBAUM: How about me?

MR. MC GUIRE: You, too.

MR. EDELBAUM: I didn't want to be a stepchild.

THE COURT: How long will it be before Hellerman is brought up?

MR. MC GUIRE: I don't know. He is on a nearby floor and it should not take any time. I have notified the marshals regarding him. As your Honor knows, there have been some extraordinary precautions taken to assure his security, since there has been reason to believe that there are citizens around and about who desire not to have him around and about any more. But I think we can keep that to a minimum during the course of this trial.

THE COURT: Well, Mr. Goldberg keeps on worrying about some of these matters. I might tell him that the marshals wanted considerably more security for this courtroom, and they had a whole string of suggestions which I have rejected, and so I am somewhat amused when you keep bringing the subject to my attention.

MR. GOLDBERG: If I knew of that I would not have imposed upon you with any added request.

THE COURT: If you looked about you would see there is very little security. As a matter of fact, it is non-existent, except for one marshal.

MR. GOLDBERG: Your Honor, at the time Mr. Hellerman was placed in protective custody the docket sheet of the Belmont case shows that there is a memorandum of understanding or agreement entered into between Mr. Hellerman's attorneys and the United States Attorney, which was filed with Judge Lasker.

MR. MC GUIRE: We have it as 3500 material.

I am informed that the witness is in the courtroom.

THE COURT: Very well. Will you please return to the courtroom, see that the witness is put inthe witness chair and that the marshals are stationed where they ordinarily take their positions.

(Proceedings continued in open court with the jury in the box.)

THE COURT: We will recess for the day at 4:45.

MICHAEL C. HELLERMAN, a witness called on behalf of the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MC GUIRE:

Q Are you the same Michael C. Hellerman who is named as a defendant in this case?

A Yes, I am, sir.

Q Has there been a disposition of this case with respect to you, sir?

A Yes, sir.

Q What has happened?

A I pleaded guilty to three cases and I received a two-year prison sentence.

Q When did that happen?

A On November 6th.

Q Are you presently serving that sentence?

A Yes, I am, sir.

Q I take it, Mr. Hellerman, you know of a stock called Belmont Franchising Corporation?

A Yes, sir.

Q When and from whom did you first hear about Belmont Franchising Corporation?

A The very first time was from George Drykerman. That was the very first time I heard of Belmont, from Drykerman and Murray Taylor.

MR. EDELBAUM: May I ask the witness to raise his voice. I can just barely hear him.

THE COURT: Keep your voice up.

Q Approximately when did you first hear of Belmont Franchising Corporation through Drykerman and Taylor?

A Approximately November, the year previous to the time that I actually made a deal in Belmont.

THE COURT: When was that?

Q Would that be November of 1969?

A Yes, sir.

Q Do you know a man named Fred Goodman?

A Yes, I do.

Q Approximately when did you first meet him?

A A little before I met George Drykerman in the Imperial stock deal I met Freddie Goodman.

THE COURT: When was that?

THE WITNESS: In 1969.

Q Do you know a man named Anthony Soldano?

A Yes, I do.

Q When did you first meet Soldano?

A Around the same time I met Freddie Goodman.

Q In 1969 some time?

A Yes, sir.

Q Do you know a man named Johnny Dioguardi?

A Yes, sir.

Q When did you first meet Johnny Dioguardi to the best of your recollection?

A 1963, 1962, somewhere in that area, between '62 and '64.

Q Do you see Johnny Dioguardi in the courtroom?

A Yes, I do.

Q Will you point him out?

A Yes, sir (indicating).

MR. GOLDBERG: On stipulation the defendant Dioguardi has been pointed out.

Q Do you know a man named Louis Ostrer?

A Yes, sir.

Q Approximately when did you meet Louis Ostrer?

A Around 1969.

Q Can you point him out in the courtroom?

A Yes, sir (indicating).

MR. EDELBAUM: Identification is conceded.

Q Now, sir, you say you met Dioguardi some time in the early '60s?

A Yes, sir.

Q Was your relationship with Dioguardi social, business, both, or some in combination?

A When I first met him, both.

Q Social and business?

A Yes, sir.

Q And how long did you continue to have a social and business relationship with Mr. Dioguardi?

A At first just a very short time, six months, a short time the first time I met Mr. Dioguardi.

Q Thereafter was there a period of time when you had no relationship with Mr Dioguardi?

A Yes.

Q After that was therea period of time when you once again commenced to have a relationship with Mr. Dioguardi?

A Yes.

Q When did that start?

A '64, '65. Right about the time I opened my restaurant.

Q Was that relationship social or business or both?

A At first social.

Q Did it become a business relationship?

A Yes.

Q Directing your attention to the middle or end of 1969 was there a formal business relationship between you and Mr. Dioguardi?

A Yas.

Q Tell us what that relationship was?

A I was in Johnny's house and Johnny had done a lot of favors for me and one day he said to me -- not that I would not do the favors anyway if it was just friendship -- but he would like to know where he and I stood, and I told him that whatever I did in the future, that he would have 25 per cent.

Q Can you tell us approximately when this conversation took place?

A Some time duirng the Imperial deal, right around that deal.

MR. GOLDBERG: Might I approach the side bar, your Honor?

THE COURT: Yes.

(At the side bar.)

MR. GOLDBERG: I move for the withdrawal of a juror and the declaration of a mistrial on the following grounds: The government here has put into evidence a participation that the defendant Dioguardi may well have had in the Imperial deal. He says he had this discussion with about the time of the Imperila deal and this puts the defendant Dioguardi in as a principal to 25 per cent of all the things this fellow did, including the Imperial deal.

Where am I wrong that this is proof of other claims? It is particularly horrendous where the defendant Dioguardi has been acquitted in Imperial. There have been cautions here about Imperial .

The timing of this meeting has been cleverly coincided with the Imperial deal and it took --

MR. MC GUIRE: That is preposterous.

MR. GOLDBERG: I know it is. My record is complete.

THE COURT: What non-plusses me is why Hellerman has to fix time by speaking of any other act instead of giving an estimate of time?

MR. MC GUIRE: Your Honor, in the first place let me respond to Mr. Goldberg's motion by saying that nothing has been cleverly concocted at all. This is not an answer which the government purposely elicited from the witness under any circumstances. This man is obviously extremely nervous on the witness stand and he does relate occurrences to events rather than to dates. I can tell that from my prior experience with him.

However, at the very worse this answer puts a contiguity in time between the Imperial and Hellerman's first saying to Dioguardi that he had 25 per cent of him. There has been no suggestion and there will be no suggestion that there was anything further to do with Dioguardi's participation in profits, if any, relating to Imperial.

I think Mr. Goldberg is making a mountain out of a molehill here.

MR. GOLDBERG: May I respond, your Honor?

THE COURT: Surely.

MR. GOLDBERG: One could see this coming unless cut off by a prosecutor who is interested in not injecting this kind of prejudice into the case. You could see the lead in where he said he had 25 per cent of Hellerman.

MR. MC GUIRE: Mr. Goldberg is accusing me of bad faith and that is not true.

MR. GOLDBERG: When he inserted the Imperial deal fixing it in time with the making of the 25 per cent deal it is obvious now to the jury that all the testimony we have had through Goodman of the Imperial stock fraud, Dioguardi was a principal in Imperial. Mr. Hellerman has by denying or otherwise put that 25 per cent in at the very time when he specifically uses the words "at the time of the Imperial deal".

How could you possibly read this, your Honor, if you are a juror as indicating anything other than that Dioguardi was involved to 25 per cent of what Hellerman made and Goodman says he made a fortune in the Imperial deal? Why couldn't we go right to Belmont? I say that I was wrong in the Soldano situation on Goodman although there was a little trace of it coming through. This is an outrageous injection of his name.

MR. EDELBAUM: Your Honor, I am concerned about this because of the fact that the government opened lumping my client with the defendant Dioguardi as one of the men behind the scenes. I say this is something which the government by its very statement, by Mr. Mc Guire's statement, that the witness was very nervous and relates times to events, that he had prior experience and knew about that from his interviews with the witness Hellerman; and if he had such prior experience how easy it would have been to have alerted the witness not to relate time or in any way connect the defendant Dioguardi with the Imperial deal?

In the light of what happened I must respectfully join with my colleague and move for the withdrawal of a juror because there can be no other conclusion by the jury other than that Dioguardi was a partner with him in the Imperial deal in the context of what has transpired already in this courtroom, and because of that it has to reflect over onto the so-called men behind the scenes. Remember the remark which your Honor has stricken but of course the jury can still recall it despite the fact that your Honor very quickly sustained my objection and told the jury to disregard it, the fact that we are so tied up by the man behind the scenes; so I say to your Honor, I see no alternative respectfully but this is Mr. Mc Guire's complete error and I think we are all entitled to a trial free of prejudice. Now, through Mr. Mc Guire's carelessness -- and I am not accusing him of bad faith but he is just as responsible if it was carelessness-- the motion for mistrial should be granted.

THE COURT: Do you wish to say anything further?

MR. MC GUIRE: I think not.

THE COURT: Motion denied. The answer to the last question is stricken as being unresponsive.

(In open court.)

THE COURT: Ladies and gentlemen, the answer to the last question is stricken.

You will recall that I on a previous occasion at an earlier time talked to you about the meaning of striking an answer. You will recall, I am sure that I said, that where an answer is stricken by order of the Court unless it is also stricken from your recollection, from your mind, totally and completely, the action of the Court becomes a meaningless gesture.

So what I mean to say, just putting my instructions in somewhat different form, when I say "strike it", you are to strike it from your recollection; that is to say, further, that when you come to deliberate you are only to deliberate concerning facts which are in evidence, so anything which is eliminated and stricken from the record is not before you for consideration.

Again I emphasize, you are not to consider any question, any answer, which is stricken from the record. You are not to consider any document which is stricken from the record.

Is there any doubt in your mind concerning your understanding of what I am saying to you? Can I say it any clearer or do you understand what I say?

Just to give you a little illustration: Somebody said "What time of day is that?" And the answer was "1 o'clock in the afternoon". If I would order the question stricken and the answer stricken, when you would come to your deliberations about that it is justas if it was never said, just as if it never happened.

Is that clear?

I depend upon you fully to adhere to my instructions not alone because you have taken an oath to do so but because I have faith in the jury and faith in you.

Thank you.

Let us proceed.

Q Mr. Hellerman, can you tell us approximately what the date was --

THE COURT: Mr. Hellerman, when you are asked about dates give us your best estimate, give us your best recollection, and if you have no recollection, if you don't know, indicate that.

A Yes, sir.

Q Can you tell us what the approximate date was that you formalized this arrangement with Mr. Dioguardi that you told us about?

A Approximately the middle to the third quarter of 1969.

Q Did there come a time, Mr. Hellerman, when you made the beginnings of a deal with respect to Belmont Franchising Corporation stock?

A Yes, sir.

Q Tell us what the approximate date of that was?

A February 1970.

Q Can you tell us when in February 1970?

A It was a holiday. I don't remember whether it was Lincoln's Birthday or Washington's Birthday, but it was a holiday in February.

Q Tell us where?

A Murray Taylor's office.

Q Tell us who was present at this time?

A Murray Taylor, Freddy Goodman, myself, and Eddie Garoff.

Q Who is Ed Garoff?

A He was a friend of mine and Johnny's and he happened to drive me into New York that time and came up to the room. He sat on the side while we discussed this.

Q Did you live in New York at that time, sir?

A New York City?

Q Yes.

A No, sir.

Q Where did you live?

A Bay Side.

Q Where is that?

A Long Island, Queens.

Q Can you remember, Mr. Hellerman, what the discussion was between you, Mr. Goodman, Taylor, if he participated, Garoff, if he participated, at that meeting in February? Tell us what you said, what Mr. Goodman said and what the others said.

A Mr. Garoff did not say anything. He sat in the corner.

Mr. Goodman and Mr. Taylor and I discussed Belmont, that Mr. Goodman, Freddy, that George Drykerman had placed all of Belmont stock when they brought the issue out and Freddy Goodman had access to get all of that stock. It was approximately 27 or 28,000 shares.

Q This is what Goodman told you?

A Right.

Both Goodman and Taylor, because everything that Goodman said Taylor confirmed.

Goodman, Freddy, said that he could give George

Drykerman between five and five and a quarter for the stock and buy the whole, all the floating supply of stock that was out.

At that point I had buying power; what I mean by that, I had --

Q Mr. Hellerman, let me stop youhere. I want you to relate only the conversation that took place. Your statement to us that you had buying power is not responsive to my question unless that is what the discussion was between you.

A When I explained to Freddy and Murray that I would buy the whole package of stock from them -- and I was able to do that because I had customers who had funds available to buy stock, and the deal we worked out was that I would receive after the purchase was made at 15 --

Q Once again, I would like to ask you to relate to us what the conversation was between you and Mr. Taylor and Mr. Goodman. It's not responsive to my question if you tell us your conclusion as to what the deal was that you worked out. Please try and give us your best recollection as to how the meeting went, how the discussion went. Do you understand that?

A That's what I'm doing.

It was agreed at the meeting, the discussion was, for the purpose of setting up a deal, and after I had arranged -- if I would arrange for the purchase of the stock at $15 I would receive $5 a share back for myself and Drykerman would get between 5 and 5-1/4, whatever Goodman and Soldano worked out with him, and they would keep 4-3/4 or $5 a share, whatever Drykerman didn't get, the difference to $15, and that's how the money would be split up andthat was the deal that was worked out in Murray Taylor's office that day.

Q That's what you discussed?

A Yes.

Q How long did that discussion take?

A An hour. 45 minutes. An hour and 15 minutes.

Q It's taken you just a couple of minutes to relate it here. What consumed that length of time in discussion? Can you tell us?

A When I was sitting with Goodman I wanted to make sure that he really had the stock placed, that he could get the stock, that what -- was he really giving Drykerman $5 a share, 5-1/4 a share? Would he try to rob extra money from me? It took that long to make -- to reach an understanding.

Q You asked Goodman a number of questions about the mechanics?

A Correct.

Q Did Goodman respond to those questions?

A Yes.

Q Is there something you have not told us?

A We also had to discuss that Goodman would be responsible to get the stock, the price that was on the market then of $3 or $4, to $15 for me to purchase it.

Q Did you discuss the mechanics of doing that?

A Goodman told me he would take care of it. I was not involved in the mechanics of how it was going to get to $15. I wanted to see the stock at $15.

Q Did the name Anthony Soldano come up during the course of this discussion?

A Yes, sir.

Q Can you tell us how that happened?

A Murray Taylor, Freddy Goodman, and I had agreed tentatively to the deal. Anthony -- Tony Soldano -- Freddy Goodman was with Tony Soldano and before we could finalize the deal he wanted me to explain the deal to Tony Soldano and --

Q Goodman asked you to explain the deal to Soldano?

A He could not do anything. Soldano was like his partner and he could not do anything. So he made an appointment for me to see Soldano.

Q Did you in fact see Soldano?

A Yes, I did.

Q Where did you see him?

A In a coffee shop on 36th Street -- 99 Park Avenue is the address of the coffee shop. We used to meet there all the time.

Q Did you have a discussion with Soldano there?

A Yes.

Q Can you tell us as best as you can recall what you said to Soldano and what he said tovou?

A I explained the deal as we had discussed the previous day in Murray Taylor's office.

MR. EDELBAUM: I move to strike thatout as a conclusion, "as we had discussed the previous day." That's a conclusion.

THE COURT: I think we will suspend at this point.

9:30 tomorrow morning, ladies and gentlemen.

(Adjourned at 4:40 p.m.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-------------------------------------x

UNITED STATES OF AMERICA

vs.

JOHN DIOGUARDI and
LOUIS OSTRER

Defendants

-------------------------------------x

Before:
HON. DAVID N. EDELSTEIN, D.J.
and a Jury.

71 Cr. 558

New York, January 9, 1973

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STENOGRAPHER'S MINUTES

409: 630

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLAND 7-4580

United States of America

v. 71 Cr. 558

John Dioguardi and Louis Ostrer

New York, January 9, 1973
9:30 a.m.

- - -

(Trial resumed.)

(Jury in box.)

MICHAEL C. HELLERMAN, resumed.

THE CLERK: Mr. Hellerman, may I remind you you are still under oath?

THE WITNESS: Yes.

DIRECT EXAMINATION

BY MR. MC GUIRE (Continued)

Q When we concluded yesterday, Mr. Hellerman, you were telling us about a meeting that you had with Mr. Tony Soldano, and am I correct you told us that that meeting occurred at a coffee shop at 99 Park Avenue, New York?

A Yes, sir.

Q When we concluded yesterday do you recall whether you had told us everything that had occurred during the course of that meeting?

A I had not finished.

Q You had not?

A No, sir.

Q Tell us, if you will, the remainder of the discussion as to which you did not testify yesterday.

A We went over the terms of the agreement I had reached with Mr. Taylor --

MR. GOLDBERG: I can't hear the witness.

THE COURT: Just keep your voice up.

THE WITNESS: I am sorry, sir.

I went over the terms of the agreement with Mr. Soldano that I had reached with Freddy Goodman and Murray Taylor, and then I made arrangements for Tony Soldano to see Johnny to make sure that it was on record, the deal that we had made was on record, so nobody could back out of the deal.

Q Now, when you say you made arrangements, tell us in more detail just what you did, if you can recall?

A I told Tony that we had to see Johnny to make -- to put everything on record, that everything was done the right way.

Q Did Soldano subsequently see Johnny to your knowledge?

A Yes, he did.

Q Was it in your presence?

A Yes, it was.

Q Where?

A In Johnny's office.

Q When?

. The next day or the day after. We made an appointment for as soon as possible and I met Tony. Tony was already there, and I met Tony in Johnny's office.

MR. EDELBAUM: Can we fix the time?

THE COURT: When was this?

THE WITNESS: February '70, sir.

Q February, 1970?

A Yes.

Q Please try and keep your voice up, Mr. Hellerman. The last lady in the jury box here has to hear you and counsel have to hear you.

So you went to Johnny's office?

A Correct.

Q Did a discussion ensue there?

A Yes, sir.

Q Can you tell us what you said, what Johnny said, and what Soldano said to the best of your recollection?

A Tony and I explained the terms of the agreement to Johnny and Johnny told Tony, he said that that is the agreement and anything I come back and tell Tony, any other changes in the deal --

Q -- this is Mr. Dioguardi saying all of this?

A Right. -- if I come back and tell him that the deal changed to this, to that, that it has no merit and has no weight because he must, Mr. Soldano, Tony, must clear with Johnny if I come back and tell him if there is any difference in the deal. The deal is the way we are leaving it off and that there can't be any changes in the deal, and unless it is cleared with Johnny first, unless Tony comes back, not to take my word for what I say. That is the way we left off.

Q How long did you spend in Mr. Dioguardi's office?

A An hour; 45 minutes.

Q Where is this office located?

A 29th Street and Fifth Avenue.

Q After that, Mr. Hellerman, what was the next thing you remember doing in connection with Belmont Franchising Corporation stock?

A First I waited for Freddy, that is, Freddy Goodman, to get the stock up to $15.

Q Did you have any further meetings with respect to the deal?

A With respect to the terms of the deal?

Q Yes, sir.

A The terms were set. We met --

MR. GOLDBERG: I move to strike.

THE COURT: Strike it. Listen to the question.

Q Did you have any further meetings with respect to the terms of the deal?

A No, not for the [illegible] f the deal.

Q Well, you have told us about a meeting with Mr. Goodman and Mr. Taylor at Mr. Taylor's office?

A Yes, sir.

Q And you have told us about a meeting with Mr. Soldano at the coffee shop?

A Yes, sir.

Q And you have told us --

MR. GOLDBERG: I move to strike. I object to the form.

THE COURT: I will allow it.

Q You have told us about a meeting with Mr. Soldano and Mr. Dioguardi at Mr. Dioguardi's office.

A Yes.

Q Was there a subsequent meeting about the terms of the deal?

MR. GOLDBERG: I object to it. It has been asked and answered.

THE COURT: I will allow it.

A I can't answer that question yes or no, Mr. Mc Guire. There were many, many meetings, but your question on the financial terms, the $5 that I was to get, the $5 that Drykerman was to get, and the 4-3/4 that Goodma was going to get, that was set at that point, but there were many meetings afterward about how everything was going.

Q Do you know a brokerage firm by the name of J.M. Kelsey & Company?

A Yes, sir.

MR. EDELBAUM: Speak a little louder.

A Yes, sir.

Q Did there come a time when you told any representative of that firm of the terms of the deal?

A Yes, sir.

Q When did that occur?

A At the time the deal was made in February, 1969.

Q You mean February, 1970?

A Yes, '70.

Q Who was it that you informed of the terms of the deal?

MR. EDELBAUM: Your Honor, I object to the form of the question. I think we are entitled to what was said by Mr. Hellerman to whatever individual he was talking to, and not a conclusion about the terms of the deal.

MR. MC GUIRE: That is not the question I asked. I just asked with whom the conversation took place.

Q With whom?

A With Stevie Schoengold.

Q Stevie Schoengold?

A Yes.

Q Where did that conversation take place?

A One place was at the coffee shop, 99 Park Avenue, and in his office. I kept Stevie abreast from the time --

MR. EDELBAUM: I move to strike out that he kept him abreast.

THE COURT: Strike it.

Q Did you discuss the deal with Stevie on one occasion or more than one occasion?

A More than one occasion.

Q Over what period of time?

A months.

Q Do you recall the details of each individual conversation?

A No, I don't.

Q But, in general, can you tell us the substance of your discussions with Mr. Schoengold?

A Yes.

Q Please do so.

A I explained to Mr. Schoengold --

THE COURT: Keep your voice up.

A -- I explained to Mr. Schoengold the terms of the deal, the financial arrangements.

MR. EDELBAUM: I object to that. Terms? I think we are entitled to have him tell us what the terms were.

THE COURT: Please give the substance of your conversation.

A I went over the $5 a share that I was going to receive, the 4-3/4 a share that Mr. Goodman and Mr. Soldano were to receive, and the 5-1/4 a share that Mr. Dryerman was going to receive. I told them that Mr. Soldano had cleared the deal with Johnny.

And he was concerned that we might not get our end of the money back after we purchased the stock, and I assured him that Tony Soldano has cleared it with Johnny and we would get paid when we performed our end, we would get paid.

Q Now, you say "we," Mr. Hellerman. In talking about you and Mr. Schoengold, did you and Mr. Schoengold have a business relationship?

A Yes.

Q Tell us what that relationship was?

A I was an undisclosed owner of J.M. Kelsey & Company and Mr. Schoengold was working as a vice-president of J.M. Kelsey & Company.

Q Who was the president of J.M. Kelsey & Company?

A Jack Kelsey.

Q Did you have any discussions with him about the terms of that deal?

A Yes.

Q Was the substance the same as or different from the discussions that you had with Mr. Schoengold?

MR. EDELBAUM: That is calling for a conclusion, your Honor. I object to it.

MR. MC GUIRE: Very well.

THE COURT: Sustained.

Q Do you remember how many discussions you had with Mr. Kelsey?

A I don't remember how many there were, but they were not as many as I had with Mr. Schoengold.

Q Do you remember the details of each individual discussion that you had with Mr. Kelsey?

A No, I don't, sir.

Q Over how long a period of time did you discuss the subject with Mr. Kelsey?

A Months.

Q And can you tell us the substance of the discussions that you had with Mr. Kelsey over this period of months?

A I explained to Mr. Kelsey the financial arrangements as to the deal, the $5 a share for me and the 4-3/4 for Mr. Goodman and the 5 or 5-1/4 for George Drykerman, and I explained to him that he shouldn't worry, that we would get our money, that I had taken Mr. Soldano to see Johnny and there was no problem, as soon as the deal was done that we would get paid.

Q Now, Mr. Hellerman, you have testified that a part of the deal was for you and the people under your direction to take over this stock at $15 per share?

A Yes, sir.

Q Did you make arrangements to take over this stock at $15 per share?

A Yes, I did, sir.

Q Can you tell us when for the first time you made an arrangement for a person to take over the stock at $15 per share?

A March, early March. I believe the first people I spoke to was the first week of March and the first discussion of buy or purchase of stock was the next week, March 8th or 9th.

Q Can you tell us whom you spoke to?

A Customers of mine that had accounts with J.M. Kelsey, Tony Soldano, people I felt had access --

MR. EDELBAUM: I object to what he felt.

THE COURT: Strike it.

A -- people that had money on balance at Kelsey. At the beginning of March I spoke to Mr. Ostrer. Mr. Ostrer had --

Q Let's leave Mr. Ostrer for the time being. Can you give us the names, besides Mr. Ostrer, of other people with whom you spoke?

A Some of them?

Q Please do.

THE COURT: Keep your voice up.

A Louis Lew --

MR. EDELBAUM: How do you spell it?

THE WITNESS: L-e-w.

THE COURT: I wish you would direct your questions to me.

MR. EDELBAUM: I am sorry.

A (Continuing) Ann Messing, Charlie Donna, a man that owned Taff Foods. I don't know his name, but he bought a thousand shares.

Q Now, let us stop there.

MR. GOLDBERG: I object to interrupting the answer.

THE COURT: Overruled.

Q You spoke of a man who owned Taff Foods. What was Taff Foods?

A I don't know what Taff Foods was, but the man that owned Taff Foods bought the stock in the name of Taff Foods, owned the coffee shop at 99 Park Avenue.

Q Did you have a discussion personally with him?

A Yes, I did.

Q Can you tell us approximately when that discussion took place?

A At the end of February, beginning of March.

Q Can you tell us where that discussion took place?

A In his coffee shop.

Q Can you tell us what the substance of the discussion was?

MR. EDELBAUM: That is objected to, your Honor.

MR. MC GUIRE: I will withdraw it and rephrase the question.

Q Can you tell us, please, what you said to this man who owned Taff Foods and what he said to you?

MR. EDELBAUM: I object to it, your Honor.

THE COURT: Objection sustained.

Q Was there anybody else present during this discussion?

A Yes.

Q Who?

A Tony Soldano, Freddy Goodman, and I think Stevie Schoengold might have been there.

Q Can you tell us what the conversation was?

A I told this gentleman from Taff Foods that if he bought a thousand shares at $15 that I would guarantee his loss on the stock, that he would not have any loss and that we would share the profits 50-50, and Soldano, Tony had helped talk him into buying the stock, and my agreement with Soldano was that he and I would split the 50 per cent that I was going to get and Taff Foods would get 50 per cent.

Q Now, at the time this discussion took place, Mr. Hellerman, can you tell us what the quoted market price for Belmont Franchising stock was?

A Approximately $15.

Q Are there any other people that you had talked to with respect to buying the stock at $15 a share as to whom you have not already testified?

A Yes.

Q Who?

A Walter Bodenstein.

THE COURT: Keep your voice up, please.

MR. EDELBAUM: I didn't hear the last.

THE COURT: Bodenstein.

A (Continuing) My brother-in-law, Joel Goldfarb -- I just can't remember offhand all the other people -- Steve Drourr -- but I just can't remember all the names of everybody I spoke to.

Q Did you speak to these people before or after the stock had reached your price of $15 a share?

A When the stock had reached $15 a share, sir.

Q Now, you spoke earlier of discussions with Mr. Ostrer?

A Yes, sir.

Q How long had you known Mr. Ostrer as of the beginning of 1970?

A Six months, eight months.

THE COURT: Keep your voice up.

A Six to eight months.

Q In what connection did you know him? Business o social?

A Social.

Q Did there come a time when you began to have a business relationship with Mr. Ostrer?

A Yes, sir.

Q What was the nature of that business relationship at the beginning?

A I purchased an insurance policy from Mr. Ostrer.

Q How big an insurance policy?

A I originally applied for a million dollar policy and I eventually got two policies totalling $285,000.

Q At what time of the year was that?

A This was the end of February, the beginning of March. I had discussed purchasing the insurance policy with Mr. Ostrer before when I met him socially at different restaurants, but around the first week of March Mr. Ostrer came to my home and on a Sunday morning and we talked about what kind of policy I was going to take, and that is how we got into a discussion of Belmont Franchising.

Q You say the first week of March, Mr. Hellerman. Are you sure of the date?

A Around the first week of March. It could have been the last week of February. It could be -- but it was not -- Mr. Ostrer came twice, and the most they could have been between the time he came between the first and second time was one weekend, and he came both times on a Sunday. So there couldn't have been more than a two-week period in between.

Q You have given us a number of other dates in your testimony here. Are you confident that you are accurate in your testimony as to exactly when these meetings took place?

MR. EDELBAUM: I object to the District Attorney attempting to impeach his own witness. The witness has testified.

THE COURT: That is colloquy and that is not an appropriate objection. It is not sound. It is overruled.

Q Are you confident as to the accuracy of your memory about dates, sir?

A Whatever I gave, yes, sir.

Q Did you have a number of discussions with Mr. Ostrer concerning insurance?

A Yes.

Q I don't want you to go into those discussions, but I ask you this, sir, during the course of those discussions did you also talk about other matters?

A Yes.

Q Did you, in fact talk about Belmont Franchising Corporation?

A Yes.

Q To the best of your recollection what was the first discussion that you had with Mr. Ostrer about Belmont Franchising Corporation and when did it take place?

A It took place in my house and it was the first time Mr. Ostrer came to my house to discuss the insurance policy with me, and the stock was around $5 at the time and it was just the time I was negotiating, you know, finalizing the deal. There was nothing done yet. And I told Mr. Ostrer about the deal and I told Louie, I said, "Don't buy any stock yet because I am not sure there is going to be a deal."

Q You say you told Mr. Ostrer about the deal. Will you tell us exactly to the best of your recollection what you told Mr. Ostrer about the deal. Don't give us your conclusion; give us the words that passed between you to the best of your memory.

A Well, we got on a discussion of stock, and Louie told me about how lucky he had gotten with Smith, Jackson, and all the money he had made with Smith, Jackson, and he showed me some confirmations and the trading he had done with Smith, Jackson.

Q What is Smith, Jackson?

A A brokerage firm, and it was interesting to me because I had known the owner, Stevie Smith years before.

And then we got into a discussion about Belmont. I told him I was about to do a deal and the stock was $5 now and if there would be a deal it would be at $15, it would not at $5, that I could not get a box on the stock, and I explained to Mr. Ostrer, I started to explain what a box was, to Louie, and he said that he had worked with enough brokerage houses and enough guys on the street that he understood, and I told him please don't buy any stock at $5 and when the time was right and was he interested and the time was right I would let him know and we would work something out. That is the way we left that day.

Q And this discussion took place where, sir?

A My house.

Q After that will you tell us the next time you saw and spoke to Mr. Ostrer about Belmont Franchising stock? When was it and where?

A The very next Sunday or two Sundays later at my house.

Q And by that time, Mr. Hellerman, had circumstances changed with respect to Belmont?

MR. EDELBAUM: I object to the form of the question.

THE COURT: Sustained.

Q By that time what was the price of Belmont stock as quoted in the market?

A $15.

Q Did you have a discussion with Mr. Ostrer at that point?

A Yes, I did.

Q Can you tell us again recalling as closely as you can the words that passed between you, what you said to Mr. Ostrer and what Ostrer said to you?

A I told Louie that we were ready, now is the time to get into the deal, and I didn't know how many shares that I could get -- I was talking "us," because we were supposed to be partners in the deal -- how many shares of the 26 or 28,000 shares that Louie would buy we wuld be 50 per cent partners, I would guarantee losses, and I would get 50 per cent of the profits. I didn't know whether I could get 5,000 or 14,000 shares, I couldn't give him the answer that day, I would have to tell him the next day, and I also discussed with him about -- I asked him if he had the money to buy the stock, how much money that he could put his hands on, and it didn't seem --

Q Don't give us your conclusions. Tell us what was said.

A Mr. Ostrer said if he only got 5000 shares he could handle that but if he got more he would have to make some arrangements to handle it. And then I came up with an idea. I asked him, I said, "Do you have buying power," meaning did he have big board houses that he could buy the stock -- member firms that he could buy the stock through.

Q Let's just stop there, Mr. Hellerman. What is a big board house?

A A big board house is a house that's a member of the New York Stock Exchange -- a brokerage firm that is a member of the New York Stock Exchange.

Q And you had a discussion with Mr. Ostrer about big board houses?

A Right.

Q Tell us now what that discussion was.

A I asked Louie if he was able to purchase stock, Belmont Franchising, through houses that were members of the New York Stock Exchange.

Q And what was his response?

A Yes, that he had plenty of buying power and he had plenty of borrowing power. So I came up with the idea, I said, "Well, if you have borrowing power then I will try to get us the whole 14,000 shares because I can have the stock at 30, you could buy the stock Monday, Louie, and by the following Monday I could have the stock at 30 and this wi-l enable you to go into the bank or wherever you are going to borrow the money and borrow 50 per cent of it."

Q Borrow 50 per cent of what?

A Of the $30 price as per, for example, if you had 10,000 shares and the stock was 30, it would be worth $300,000. A bank would normally on an over-the-counter stock lend you 50 per cent. So if he borrowed 50 per cent he would have $150,000 which was the original price of the 10,000 shares, 10,000 shares, $15, $150,000. This way we could purchase 14,000 shares together, he would have the buying power and the borrowing power and I would have the market up to $30 and we could have the 7000 shares and never lay out a quarter for it.

Q What did Ostrer say to this proposition?

A Loved it. He said he would be able to do it and there was no problem.

Q During this general period oftime, Mr. Hellerman, did you have occasion to see Mr. Dioguardi?

MR. EDELBAUM: I object to the form of the question.

THE COURT: I will allow the question.

Q Did you have any discussion with Mr. Dioguardi on the subject of Belmont Franchising stock?

A Yes.

Q Can you tell us what -- tell us first when this discussion took place and where, if you can remember.

A I saw Johnny practically every day of my life. To pin down a date or a day is very difficult for me. But in reference to Louie, I had told Johnny Louie was going to buy the stock even before the stock got to 15, even before I made the deal with Louie. Johnny told me, "Louie ain't going to buy the stock. Louie is a pretty shrewd guy. He is not going to buy the stock."

I said, "I'm telling you" --

MR. EDELBAUM: May I havethe court reporter please read the answer?

THE COURT: I suggest you move a little closer, Mr. Edelbaum.

MR. EDELBAUM: I will do that, your Honor, because I want to hear it.

Would you repeat the last question and answer?

(Record read)

Q Please finish.

A That Louie was going to buy the stock and Johnny told me, "Before you do any business with Louie, you make sure to bring him up to see me."

Q Did you do that?

A Yes, I did.

Q When?

A The next Monday, the very next day, on Monday. I brought Louie to Johnny's office.

Q And did a discussion take place there?

A Yes.

MR. GOLDBERG: Your Honor, could we fix the month at least?

THE COURT: What month was it?.

THE WITNESS: March, 1970.

Q And can you tell us, please, what you said, what Mr. Dioguardi said and what Mr. Ostrer said.

A I was sitting on the left, Louie was sitting to the right and Johnny was sitting behind a desk. I explained the deal --

MR. EDELBAUM: I move to strike it.

THE COURT: Tell us what you said.

A I discussed --

MR. EDELBAUM: I object to it.

THE COURT: Give us the words as best as you recall, what you said.

A I said that Louie and I were going to buy 14,000 shares of stock togehter and we were going to be 50 per cent partners in the stock and the stock, we were going to make a purchase at $15 and Louis had the purchasing power to buy the stock and when it got to 30 -- I would take it to $30 within a week and Louis would be able to borrow $15 a share and we would be partners in 14,000 shares and I would get 50 per cent of the profits.

Q Was there any discussion about big board houses?

A I explained that the purchase would be through big board houses, and Johnny told Louie, he said, "Listen, I don't want any aggravation." He said, "Louie, you are with who you like to be with when it's convenient for you." He said, "If you are with who you are supposed to be with, then I have a right to talk for him and then there is no problem." He said, "If you are going to start bringing anybody in, including Hickey, then I want to know about it now because I don't want Mike to get into any deals that is going to cause any aggravation or any problems."

Louie assured Johnny that --

MR. GOLDBERG: I object to that.

THE COURT: What did Louie say?

A Louis told Johnny, "Hickey is only my partner in the insurance business and the blood machine and that's all."

Then we were given permission to do the deal.

Q Now, you spoke of a man named Hickey. Who is this man Hickey?

A Anthony DiLorenzo.

Q Anthony DiLorenzo ?

(Witness nods)

Q At this time, Mr. Hellerman, did you have any financial arrangements with Mr. Dioguardi?

A No -- the only financial arrangements I had were that anything I did Johnny got 25 per cent of.

Q Did you have a discussion with Mr. Dioguardi about this time concerning money?

A Yes.

Q Can you tell us when that discussion occurred, where it occurred, and what was said between you?

A It occurred about the second week of March and we were riding home from New York one night. It was late.

Q You were riding home?

A From New York, right.

Q Was this in a car, a train or what?

A We drove in a car. We live right near each other. We used to go into work, into the city, practically every day together.

MR. GOLDBERG: I move to strike that as not responsive, your Honor.

THE COURT: Strike it.

A Johnny and I used to drive home --

MR. GOLDBERG: I move to strike that as not responsive.

MR. MC GUIRE: I will ask a question.

Q Did you have a practice, Mr. Hellerman, with respect to traveling with Mr. Dioguardi?

A Yes.

Q What was that practice?

A We used to go into the city a lot together in the morning and we came home practically every night together.

Q On one of those occasions did you have a discussion with Mr. Dioguardi about money?

A Yes.

Q Please tell us what it was.

A Johnny told me that he needed $50,000 and he was very upset about it. When we got to the corner of -- I think 18th Avenue and 215th Street, right where you make a right to Johnny's house was first on the righthand side, it was like three houses in --

THE COURT: Keep your voice up.

THE WITNESS: I said, "John, if you can wait until next Wednesday or Thursday of next week, I will conclude the first part of the deal with Soldano and Goodman and I will give you the $50,000."

Q Now, during your various discussions that you have told us about, with Mr. Ostrer and Mr. Dioguardi, was the subject of your plans with respect to the future of Belmont Franchising stock mentioned?

MR. EDELBAUM: I object to the form of the question.

THE COURT: Sustained.

MR. MC GUIRE: I will lay a foundation.

Q Mr. Hellerman, have you told us everything about your discussions with Mr. Ostrer and Mr. Dioguardi to the best of your recollection?

A No.

Q Can you remember now what you have left out?

MR. EDELBAUM: May we have them separately and not lumped together, your Honor. That was one of the bases for my objection. There were separate discussions, there was one discussion allegedly together.

THE COURT: Will you rephrase your question.

Q Do you remember, Mr. Hellerman, with respect to either Mr. Ostrer or Mr.Dioguardi or both of them together, if that was the fact, whether you have omitted to tell us something about the various discussions that you have testified to? First tell us whether the answer to that question is yes or no.

A Excuse me. ARe you asking that question up to the point that we have gotten so far?

Q Yes, sir.

A Then the answer is that I haven't forgotten anything.

Q Did you have occasion after this time, after the first week in March, 1970, or the second week in March, 1970, to have further discussions with either Mr. Ostrer or Mr. Dioguardi?

A Yes.

Q And can you tell us with whom?

A With both Johnny and Louie.

Q Over what period of time?

A Months.

Q How many discussions were there?

A I couldn't count them. I wouldn't know.

THE COURT: One, two, three or more?

THE WITNESS: Your Honor, a lot. I just couldn't pin down one or two or three. There were many, many discussions.

Q During those discussions with either of them, was the -- I will withdraw that.

Can you tell us what the substance of those discussions was?

MR. EDELBAUM: May we have with which? He is lumpting them together. I think I am entitled to know --

MR. MC GUIRE: With respect to each of them, obviously.

A The very first day that Louis was supposed to buy the stock, I was up in his office when he started to buy the stock.

Q And you had a discussion with him then?

A Right.

Q Can you tell us what that discussion was between the two of you?

A Look, I bought 2000 shares from Eastman Dillon.

Q Is Eastman Dillon a big board house?

A Yes, it is. Then he tried to buy stock through other big board houses.

Q This is all in your presence?

A Right. And they were refusing his orders. They wouldn't take his orders. They had problems with him, or whatever it was, and they wouldn't take his orders.

Q You didn't hear the other end of the telephone conversation?

A No, I didn't.

Q But you did hear his end, right?

A Yes. Then Louis put in a 1500 share buy order through American Global and I looked at him because --

MR. EDELBAUM: I object to what he looked at him because and move to strike it.

THE COURT: I will allow he looked at him but strike the "because."

A I told Louis the agreement is buying the stock through member firms, it was not to place a 1500 share order through American Global, which is an over-the-counter house.

He said, "Don't worry about it. I control the firm." He said, "Don't worry about it. There is no problem with that order."

I saw Louis couldn't put --

MR. EDELBAUM: I object to the conclusion and move to strike it out.

Q No conclusions.

A Louis was not able to execute the 14,000 shares of buying he was supposed to execute. He was having trouble.

MR. MC GUIRE: May Mr. Schaffer be excused. He is required in the Court of Appeals.

THE COURT: He may.

MR. SCHAFFER: Thank you, your Honor.

Q You say you saw or heard Mr. Ostrer place an order for 1500 shares with American Global?

A Yes.

Q An over-the-counter house?

A Right.

Q Did he place any other orders in your presence at that time?

A I don't remember what orders were accepted, but he called quite a few brokerage houses to try to place the orders, but I don't remember on that particular day which ones were accepted and which ones weren't accepted except the Eastman Dillon and the American Global order.

Then Louie told me that -- now, are you talking about that particular day now?

Q Let's try and keep the conversations separate as much as we can, Mr. Hellerman. I know it is difficult.

A I can't remember if it was that day or the next day or the day after, but I was seeing Louie every day now because I couldn't take the stock to $30 until he had purchased the 14,000 shares.

MR. GOLDBERG: I object to that characterization, your Honor, or explanation. He can say when he saw him.

THE COURT: Right.

Q Did you have discussions with Mr. Ostrer on these succeeding days?

A Yes.

Q Can you tell us your part in the discussions?

A Louie said -- I said -- excuse me. Louie said to me, why don't you place an order for me at the firms that I know, and once you place the order we can do the same thing.

Q And what was your response to that?

A You see, when you place an order --

Q What was your response? Don't explain things to the jury. Say what you said to Mr. Ostrer, please.

A First I didn't want to go it but I had no choice.

MR. EDELBAUM: I move to strike that out.

THE COURT: Strike.

Q Please, Mr. Hellerman, relax. Take a deep breath and listen to my question.

MR. EDELBAUM: Your Honor, I object to that.

MR. MC GUIRE: I am trying to get responsive answers, your Honor.

THE COURT: You are not a voice instructor or a gym instructor.

MR. MC GUIRE: I am not.

THE COURT: I am not sure taking a deep breath is going to accomplish anything.

MR. MC GUIRE: Would your Honor direct the witness, please, to listen to my question carefully?

THE COURT: That is better.

MR. MC GUIRE: And to answer them as accurately and precisely as possible.

THE COURT: Mr. Hellerman, listen to the question. If you don't understand it, please indicate that and counsel will attempt to reframe the question for you. You know what a responsive answer is. Answer the question. Don't give us your thoughts, your conjectures, your speculations, your conclusions. When you are asked about conversations, give us the exchange or conversation, give us your best memory what was said to you and what was said in return. Is that clear?

THE WITNESS: Yes, sir-

THE COURT: All right, let's start again.

Frankly, if there is an objection I don't think fire and heat accomplishes anything. It doesn't impress me.

MR. EDELBAUM: I don't understand about the fire and heat.

THE COURT: What?

MR. EDELBAUM: Are you referring to me?

THE COURT: To both of you.

MR. EDELBAUM: I am not trying to be firey.

THE COURT: All right.

Q Now, sir, you have told us that you saw Mr. Ostrer virtually every day.

A Yes.

Q And I direct your attention specifically to those occasions on which you and Mr. Ostrer discussed the purchase of Belmont Franchising stock.

A Yes, sir.

Q Do you have that firmly in mind?

A Yes, sir.

Q Do you remember each individual conversation that you had with Mr. Ostrer?

A No, sir.

Q Can you tell us in substance during that period of time, during those conversations, what you said to Mr. Ostrer and what he said to you?

A Yes, sir.

Q Please do that for us.

A Mr. Ostrer asked me if I would get the execution of the orders done for him, thathe was having trouble and he couldn't do it and would I place the orders through brokerage houses that I knew.

I subsequently arranged that for Mr. Ostrer and I put in a 5000-share buy order -- for thepurchase of 5000 shares of Belmont Franchising at J. M. Kelsey & Company, I put in an order for 5000 shares of Belmont Franchising with Bruce & Company, and I arranged a 500-share order for him, for Mr. Ostrer, through Alger Securities.

Q Now, did you say you placed those orders, Mr. Hellerman?

A Yes.

Q Did you place them in Mr. Ostrer's presence?

A The Kelsey order I placed in Mr. Ostrer's presence and Mr. Schoengold came up to see Mr. Ostrer to make sure that the order in fact was an order. The Bruce order I placed outside of Mr. Ostrer's presence but Bruce called Mr. Ostrer in front of me to confirm the order, that I was placing the order for him of 5000 shares.

Q And by Bruce & Company do you mean Bruce Halpern?

A Yes, I do.

Q During the course of these discussions, was anything said about Mr. Ostrer's plan to pay for this stock?

A Every time I saw Mr. Ostrer he kept putting me off another day, "We'll work it out; I will get the money," and always at the end of the conversation Louie kept saying, "If you go to Johnny, Johnny can get us the money. I can't get it. I can't borrow any money but if you go to them they will get us the money."

And at the end of each day Mr. Ostrer would let me -- would tell me that, "Why don't you go speak to Johnny, why don't you go speak to Johnny, they will get us the money, they will get us the money."

That was the gist of the financial arrangements as they were changing from day to day.

Q Now, you have told us about a conversation that you had in the car with Mr. Dioguardi. I believe your testimony was that you agreed to pay him $50,000.

A He asked me that he needed $50,000 and I said I would give it to him.

Q Did you pay him that money or any part of it?

A Part of it.

Q Can you tell us when and what was the source of the money?

A The first money that I received from Soldano and Goodman was $20,000, a few pennies more, maybe, and I brought that -- I made a cash trade out of the first sales of Belmont and I got paid the money and I brought the $20,000 to Johnny's office and I gave it to Johnny.

Q What was the source of that $20,000, sir?

A From the purchase of Belmont -- my customers bought Belmont stock. Goodman and Soldano were able to sell it at $15 at that time and give me back my $5 a share that I was supposed to get, and the first $20,000, that was the proceeds from the first sales, $20,000.

Q Did the $20,000 come to you by check, sir?

A No.

Q Come in cash?

A Yes.

Q Where and when?

A The coffee shop, and it was that Monday or Tuesday of March 9th or 10th, the beginning of that week, as soon as the trades were completed.

Q And when and where did you give this money to Mr. Dioguardi?

A In Johnny's office.

Q That same day, later, when?

A The minute Soldano gave it to me I ran right over with it.

Q Do you remember whether anybody accompanied you?

A I don't remember. I have a vague remembrance of Jack Kelsey being there. I can't be sure.

Q Did there come a time when you paid Mr. Dioguardi some more money?

A Yes.

Q When was that?

A Around a week later I got the next $10,000.

Q From the same general source?

A From Soldano, the same source, and I brought that to Mr. Dioguardi.

Q And where did you bring that -- let's take it one step at a time. Where did you get the money?

A Soldano, at the coffee shop.

Q And how did you receive it, in cash or by check?

A Cash.

Q And what did you do with it?

A I took it and gave it to John [illegible].

Q In his office again?

A Yes.

Q Did anybody accompany you, so far as you can remember?

A I have a recollection of Murray Winter being with me but I am not positive if that was the particular day.

Q When you gave this money in cash to Mr. Dioguardi, did you have any discussion with him, to the best of your recollection?

A I told him that as far as I could I would get him the other $20,000, that these trades were cash trades and I was able to get the money fast, the other trades I was waiting for a settlement date, I was waiting to finish up with Louie and as soon as I got the other 20,000 I would bring it to him. He told me that this would tide him over and not, you know, to kill myself getting the other $20,000.

Q Now, sir, during the period from the first week in March through the second week in March, to your knowledge -- I will withdraw it and reframe that.

During the period from the first through the second week of March, do you know how much Belmont stock was ordered by you or people under your control?

A The whole issue.

Q The whole 28,000 shares?

A 27, 27-2, something like that, whatever Goodman told me was out, the whole issue.

Q You have told us about placing orders for some of that stock; you have told us about placing orders with Mr. Ostrer, and you told us about arrangements you made with other people.

Can you break down for us on the witness stand now what orders were placed for that Belmont Franchising stock and in what amounts and where?

A I will try.

Q Do your best.

A I talked Bruce into buying 4300 shares for himself or his customers on a 50-50 basis.

Q What do you mean on a 50-50 basis?

A I would guarantee all losses and I would get

50 per cent of the profits. I talked Soldano into keeping 3300 shares. That was not on a 50-50 basis. That was on his own becuase he wanted to make a larger profit, he wanted 100 per cent of the profits. Soldano and I talked Taff Foods into buying a thousand shares. The customers that I had at Kelsey were approximately 2300 shares, 24.

Q Are these people you mentioned earlier, Mr. Hellerman?

A Yes.

Q I think you mentioned the name of Steven Drourr.

A And Messing, Charlie Donat.

Q Walter Bodenstein, was that a name?

A Yes.

Q What was the total amount of their orders?

A 2300 shares.

Q Can you account for any further stock?

A Yes. I had Jerry Kruger with Shields & Company buy 1400 shares.

Q Who was Jerry Kruger again?

A He was manager of Shields office on Madison Avenue.

Q And Shields & Company is a brokerage house?

A Right.

Q And what arrangement did you make with him, sir?

A That he would buy as much stock as he could for his customers and his customers -- and I would guarantee ths loss to his customers and get 50 per cent of the profit from his customers.

Q Did you make any other arrangements with respect to purchase of the stock?

A With Louie. That was the big one. That was 14,000 shares.

Q Were there any others?

A Offhand, that's what I can remember.

Q Does the name Morris Winter refresh your recollection?

A Yes. I told Murray to buy 1000 shares, and I think he bought 500 as Russell & Saxe, an over-the-counter house, and 500 at Ozol or he may have bought the whole thousand at Russell & Saxe, but he bought a thousand shares in his son-in-law's name.

Q Do you know where Mr. Winter received the money to effectuate that purchase?

A Yes.

Q From whom?

A I gave it to him.

MR. EDELBAUM: I don't hear.

THE WITNESS: I gave it to him.

Q Cash or by check?

A Cash.

Q How much?

A $15,000.

Q Now, sir, to your knowledge was all of that stock -- we'll leave Mr. Ostrer to the side for the moment -- was all of that other stock paid for?

A Yes.

Q With respect to Mr. Ostrer, was the situation the same or different?

A Different.

Q Will you tell us what happened with respect to Mr. Ostrer's stock?

A Mr. Ostrer didn't pay for the stock and the brokerage houses, Bruce and Company and Kelsey & Company were hanging for the money.

Q . How much money in total?

A I don't know if -- the total price was about $210,000, at that time 14,000 shares at $15, but I wasn't myself concerned --

MR. EDELBAUM: I object to whether he was concerned and move to strike it out.

THE COURT: Sustained. Strike it.

Q Did you have a discussion with Mr. Ostrer about payment for this stock?

A Yes.

Q Or more than one discussion?

A Many discussions.

Q Did you have any discussions with anybody else with respect to Mr. Ostrer or obtaining the stock?

A Yes.

Q With whom?

A With Johnny.

Q By that you mean the defendant Dioguardi?

A Yes.

Q First tell us about the discussions you had with Mr. Ostrer.

A I kept asking Louie how he was going to arrange to get the stock paid for and every day Louie would put me off, he is sending Chauncy here to borrow money from this shylock and he is going to get money here, he is going to get money over here.

MR. EDELBAUM: Your Honor, I would like a side bar.

(At the side bar)

MR. EDELBAUM: I respectfully move to strike the comment of shylock. That is a conclusion. First of all, it has a bad odor connected with anybody using shylocks, and I ask your Honor to respectfully instruct the jury again that they should totally disregard any such references.

MR. MC GUIRE: Your Honor, I believe that the witness will say that those were the words used by Mr. Ostrer. In the event that he does not, I would suggest perhaps a question from the Court would be appropriate.

THE COURT: I think you ought to pursue that to the extent you can and ask him whether shylock is his own terminology or whether that is something Ostrer said.

MR. MC GUIRE: I will do that.

(In open court)

THE COURT: I think I will take this examination over for a brief moment.

You have used the word "shylock" I think in one of your answers, is that correct?

THE WITNESS: Yes, sir.

THE COURT: Is that your characterization and description or is that what Mr. Ostrer said or what?

THE WITNESS: It was what Mr. Ostrerer said.

MR. MC GUIRE: May I proceed, your Honor?

THE COURT: You may.

BY MR. MC GUIRE:

Q Was Mr. Ostrer --

THE COURT: You do understand I don't want any of your characterizations or conclusions or reasons in any of your answers. When you are asked, and I know I have said this repeatedly, when you are asked to relate a conversation htat you testify took place, give us that conversation as best as you can, in other words, give us the words that passed between you and Mr. Ostrer. Is that clear?

THE WITNESS: Yes, your Honor.

Q Was Mr. Ostrer able to come upwith the money?

MR. EDELBAUM: I object to the form of the question.

MR. MC GUIRE: I will withdraw it and rephrase it.

?

Q To your knowledge, Mr. Hellerman, did Mr. Hellerman pay for the stock?

A No.

Q Were other arrangements made?

A Yes.

THE COURT: Keep your voice up.

THE WITNESS: Yes.

Q You said you had a discussion with Mr. Dioguardi. Was that just the two of you or was anybody else present?

A The two of us.

Q When did it occur?

A I walked into Johnny's office about 4 o'clock, 4:30 in the afternoon. I said --

Q You have given us the time of day but you haven't given us the day. Can you remember when this occurred?

A March of '70.

Q How long after Mr. Ostrer had ordered this 14,000 shares of stock?

A Approximately a week. I walked in and Johnny was sitting at his desk having a drink. I said, I need $200,000. I need it tomorrow.

MR. EDELBAUM: I don't hear. He is dropping his voice.

A "I need $200,000 and I need it tomorrow."

He busted out laughing. A big grin came to his face.

Then I sat down and told him, explained to

Johnny --

Q Don't characterize your explanation. Tell us what you said to him.

A That Louie hadn't met his commitment and that I was having big problems because Louie -- I wasn't able to meet my commitments to Bruce on the 5000 shares that I had placed for Ostrer and Soldano was on my back because Louie hadn't paid for the stock yet and Louie suggested that if I speak to him he wuold speak to Hickey and be able to get Louie and I the money to pay for the stock so everybody would be able to get off the hook, the brokers, and the deal would be able to go on.

Q This is what you told Mr. Dioguardi?

A Right.

Q The Hickey you were referring to is again Mr. Anthony DiLorenzo?

A Yes.

Q What did Mr. Dioguardi say?

A That I should tell Louie to forget about it, that I should drop the deal right there. I told him I couldn't, that Soldano was on my back and all the brokers were on the hook and I couldn't drop the deal.

Arrangements were made --

MR. EDELBAUM: I object to any arrangments were made.

THE COURT: Tell us what happened, what was said.

A Johnny told me to go down and call Louie and make --

Q Go down and call Louie?

A Right.

Q Did he tell you where to go?

A No. I called Louie and I made an appointment for Pier 52, an appointment for Louie to meet Johnny and me in Pier 52.

Q Is this on the docks or where?

A No, its on 52nd Street off Seventh Avenue or Broadway.

Q What is Pier 52?

A A restaurant.

Q And did you in fact meet with Louie at Pier 52?

A Johnny, Louie, Hickey and myself.

MR. EDELBAUM: Can we fix the date, your Honor?

THE COURT: What date was it?

THE WITNESS: March, 1970, around the end of the second week or third week of March, 1970.

THE COURT: The end of the second week or beginning of the third week in March, 1970, approximately in that area?

THE WITNESS: Yes.

Q Now, was there a discussion that took place concerning Belmont Franchising stock that night?

A Yes.

THE COURT: Was it night or afternoon?

THE WITNESS: Evening.

Q Was there eating and drinking done?

A At our discussion, there was just a few drinks, maybe. We didn't have --

THE COURT: Keep your voice up.

THE WITNESS: My recollection is we did not have dinner together.

Q How long did the discussion last?

A A couple of hours.

Q Now, go through it very carefully, Mr. Hellerman, and tell us, if you can, what was said by you, what was said by Mr. Dioguardi, what was said by Mr. Ostrer and what was said by Mr. DiLorenzo.

THE COURT: I think before we go into this area we ought to take our morning recess. About five minutes, ladies and gentlemen.

THE CLERK: The court will take a short recess. Remain seated, please, until the jury leaves the courtroom.

(Recess)

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mmbr 1 Hellerman-

(In the robing room, defendants present.)

MR. EDELBAUM: Your Honor, just about the time that Court commenced this morning there was handed to me a document which is numbered 3546 as Jencks material, I assume.

THE COURT: Before you go any further, do you thin we ought to mark it for identification?

MR. EDELBAUM: It has been marked 3546 as Jencks material. I want something done with it other than that.

Your Honor, the Supreme Court has stated in several cases that it is the duty of the Courts to supervise the fair administration of criminal justice. This document, which I am not aware whether your Honor has ever seen or not, is one of the most shocking papers I have ever had access to in all the years I have been at the bar, which would be 45 in June.

In view of this document, I respectfully move for the striking of all of the testimony of Mr. Hellerman from this record and for the withdrawal of a juror and the declaration of a mistrial on the ground that it would shock the orderly administration of criminal justice to permit such an agreement to be entered into in writing between a responsible United States Attorney and a criminal, an admitted swindler and criminal, such as Mr. Hellerman, where, in effect, the government bought and paid for his testimony in writing. I apologize if I have raised my voice, but it is my indignation that causes me to raise my voice.

Has your Honor ever seen this agreement?

THE COURT: I have not.

MR. EDELBAUM: I ask that it be marked as a court exhibit for possible review.

THE COURT: It is marked for identification. It need no other marking.

MR. GOLDBERG: Your Honor, may I be heard? I don't have the years at the bar that Mr. Edelbaum does, but I have federal and state prosecutorial experience. I have never seen a document in writing of this nature. It is out and out bribery, if you will, payment to a witness, if you will.

THE COURT: We don't need any characterizations. I am fully able to read this document and form my own conclusions. Your characterizations are not evidence. This is a gloss that I need not accept.

MR. GOLDBERG: Of course, your Honor need not.

THE COURT: If you have any argument, make it on a legal basis. I am not interested in your conjectures.

MR. GOLDBERG: I don't conjecture.

THE COURT: When you speak of a bribe, that is a term of art. Make your argument.

MR. GOLDBERG: This document reflects an out and out payment to a witness in order to purchase his testimony. A defense lawyer would not survive five minutes after such a document were disclosed by a prosecutor or a defense witness called to the stand.

MR. MC GUIRE: Perhaps your Honor would want a word or two of explanation?

THE COURT: Before I hear from you, Mr. Edelbaum has made two specific motions: One, he has asked that all of Mr. Hellerman's testimony be stricken, and as I understand it, on the basis of this document marked for identification, that his testimony is utterly incredible, and, two, he has asked for the withdrawal of a juror. Those are his motions.

MR. MC GUIRE: Yes, sir. Mr. Edelbaum has made those motions, and I take it that Mr. Goldberg joins in them?

MR. GOLDBERG: I do.

MR. MC GUIRE: On the basis of a document which has been marked as 3546 for identification, which your Honor has now seen. In substance, that document is an agreement between the United States Attorney and Mr. Hellerman dated some time last fall which was made a part of the proceedings in connection with Mr. Hellerman's sentence, was passed upon by Judge Lasker, and was filed as a Court exhibit in connection with his sentencing.

In substance, the document contains an agreement by the government to protect Mr. Hellerman and to try and keep him and his family from harm during the term of any prison sentence that might be imposed upon him. As your Honor knows, a prison sentence of two years was subsequently imposed upon him. And it contains an undertaking by the government in the event that Mr. Hellerman keeps his part of the agreement not to prosecute him on a number of designated other cases as to which he had theretofore furnished the government with information.

Now, there is a good deal of background to this document. The Hellerman story, of course, did not begin as of the date of the signing of that agreement, but I would suggest that for purposes of the argument of these motions it would not serve any purpose to go into that background. Counsel can, of course, do so on cross examination if they so desire. The government opposes the motion. I simply see no basis for a conclusion on the basis of the disclosure of this agreement that Hellerman's testimony is in any way incredible, nor do I see that there is anything shocking to the conscience of the Court which would justify the declaration of a mistrial.

On a legal basis, I find myself somewhat at a loss to say anything further than that, because I have not heard any legal ground stated for the motion. That is my argument.

THE COURT: Mr. Edelbaum stated a broad principle enunciated by the Supreme Court without inferring there are any specific citations.

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MR. EDELBAUM: Would you reserve decision on this motion and I will be happy to submit to your Honor by late today or tomorrow a memorandum in support of my contention. I am aware of a particular case which I will bring to your attention.

THE COURT: I will certainly defer to that request.

MR.EDELBAUM: There is another problem which I wish to discuss which I think is of great importance.

Now, undoubtedly if your Honor should deny my motion, this agreement in writing with the government is of considerable value in cross examining Mr. Hellerman, which your Honor can appreciate. However, it bears some tremendous dangers by the wording of it. And I am referring to the "Whereas" clause, "Whereas Michael Hellerman is in fear of his life because of his past criminal involvement with members of organized crime, from whom he fears reprisals." We are given a double-edged sword here, we are given a document which I have described, and I won't describe any further to your Honor, and then if we go into this document we have the danger of bringing before this jury a side issue which does not belong in this case

t3/2 am

I submit to your Honor that the United States Attorney had full knowledge that this document would have to be turned over to the defendants in the event that Mr. Hellerman became a witness in any trial, and I wonder about these "whereas" clauses, what the necessity for having them in such a document. So I say to your Honor, I ask your Honor to weigh carefully to the limits of what the government may do in the event we use this document in connection with his fear, because, as I understand it, for a long period of time, your Honor, when it became knowledge that Mr. Hellerman was cooperating with the government, Mr. Hellerman was at liberty, he was in no way in protective custody, he went about his usual duties, nothing happened to him.

And then to be met with this in the event we use it, I think your Honor should have discretion to the extent that the government may rebut to bring out the alleged dangers.

MR. MC GUIRE: I am not sure that I know what Mr. Edelbaum is arguing.

THE COURT: Perhaps I can be of some assistance. I will invite your comments if you think my understanding of the argument is in error.

I think what Mr. Edelbaum has stated here, in effect,is that he intends to use this document on cross examination, and he would attempt to elicit from Hellerman that an agreement was entered into and would attempt to elicit from him the substance of that agreement. He is then concerned that on cross examination the contents or the substance of this document which do not precisely relate to the gravamen of this agreement might be used by you in an attempt to rehabilitate the witness, pinpointing and referring to the substance contained in the "whereas" clause.

MR. EDELBAUM: Exactly.

THE COURT: Is that what you meant?

MR. EDELBAUM: Exactly.

MR. MC GUIRE: I get the drift, and if Mr. Edelbaum is suggesting in any fashion that the "whereas" clause that Mr. Hellerman is in fear of his life and a paragraph of the agreement that reflects the arrangements that the government promised to make to assure the safety of himself and his family are simply a sham or a fraud, put there to hinder cross examination, if that is the substance of Mr. Edelbaum's remarks, then my response is one of utter disbelief. Factually, such a contention appears to me to be absurd.

THE COURT: Well, then, to proceed further for some clarification, are you also saying or do you intend to say by that statement that you do not intend on redirect to deal with the so-called safety provisions of this agreement?

MR. MC GUIRE: No, sir, I am not making any commitment of this kind at all. I have no idea what tack Mr. Edelbaum or Mr. Goldberg will take on cross examination. And if as a result of cross examination it is necessary to bring out that Mr. Hellerman took certain actions because he was in fear of his life, then I think the recent Cirillo case, which has been decided within the last month, is plentiful authority supporting our ability and propriety of using such material on rehabilitation.

THE COURT: Rather than to extend this aspect of the discussion, wouldn't it be more appropriate to await the outcome of cross examination, after cross examination has been concluded, before turning the witness over to Mr. Mc Guire should he seek redirect examination and we will have another conference in the robing room.

MR. EDELBAUM: The only problem with that, your Honor, is this, if that should be adjudicated by your Honor adversely to us then we have stepped ur foot into it.

THE COURT: I understand that. Permit me to offer another expedient. Before you undertake -- and that, of course, includes you, Mr. Goldberg --

You expect to cross examine based on the contents of this document?

MR. GOLDBERG: I do.

THE COURT: -- before you undertake cross examination, we will have a conference in the robing room and I will hear from you concerning a short, brief, but descriptive outline of the path of cross examination which you intend to pursue, and that should give you some pretty good thoughts about where you expect to go in the event of redirect.

And perhaps if we have any problems we can resolve them.

MR. EDELBAUM: Very well.

MR. MC GUIRE: That is a fair course.

MR. EDELBAUM: May I also ask the government through your Honor -- may I ask your Honor to ask the government to instruct Hellerman very carefully that during cross examination he does not volunteer anything additional than the direct questions so as not to bring out this fear of his life and all of those aspects.

THE COURT: We will take the additional precaution after we have ironed any problems out concerning this document which arise in the robing room. The Court will then give Mr. Mc Guire an opportunity to chat with Mr. Hellerman and issue the necessary precautions, which will be developed right here in this robing room.

MR. EDELBAUM: May I have five minutes to make a telephone call to put into operation the memorandum which I wish to give you?

THE COURT: Just one more question: Do you expect or do you intend to offer this document in evidence?

MR. EDELBAUM: The entire document? No.

THE COURT: Do you expect to offer any part of this document?

MR. EDELBAUM: If I do, there may be a question about the whole thing. So I would be out of my mind, to put it clearly.

THE COURT: While you are asking your associate back in the office to get this memorandum --

MR. EDELBAUM: There will be two prongs. I would like him to address himself also to the prong about this other material, too.

THE COURT: And I would also suggest that you take or have your associate take a close, hard look at Cirillo.

MR. EDELBAUM: Yes, and compare Cirillo.

THE COURT: Can you help Mr. Edelbaum by giving him the precise citation?

MR. MC GUIRE: It is in the slip sheets. It has been decided within the last month or six weeks.

MR. EDELBAUM: United States against Cirillo.

MR. MC GUIRE: Yes. I might take this opportunity to put on the record the fact that pursuant to our many discussions pre-trial I have also furnished counsel with certain other material in addition to the text of this agreement. I have furnished counsel with copies of the various indictments in which Hellerman has been named. I have furnish counsel with a list of matters prepared by Mr. Wing of our office as to which the government has information, and the agreement itself refers to certain criminal cases or investigations in which Mr. Hellerman is involved in one way or another.

All of that has been done under the general doctrine of Brady against Maryland, the furnishing of information in the government's possession which might tend to affect the credibility of the witness.

MR. EDELBAUM: All I have gotten is some copies of indictments and a memorandum of agreement. Is there something else?

MR. MC GUIRE: I think youalso got a list of matters prepared by Mr. Wing?

MR. EDELBAUM: No.

MR. MC GUIRE: I think you will find it on your desk.

MR. EDELBAUM: You gave me this one bunch. I don't have it on my desk.

MR. MC GUIRE: I have another copy and I will furnish it to you.

THE COURT: Do you have all the documents?

MR. GOLDBERG: I have all the documents.

THE COURT: Will you please notify the clerk when you are ready?

MR. EDELBAUM: Thank you very much.

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(In open court; jury present)

MR. MC GUIRE: Shall I go forward, your Honor?

THE COURT: You may proceed.

BY MR. MC GUIRE:

Q Mr. Hellerman, you were telling us about a meeting at Pier 52 restaurant, if I recall correctly.

A Yes, sir.

Q You were about to tell us what the discussion was between yourself, Mr. Ostrer, Mr. Dioguardi and Mr. DiLorenzo. You told us that that discussion took some two hours, I believe.

A Approximately.

Q Can you remember all of the conversation that took place during that two hours?

A No, not all of it.

Q To the best of your memory, go through the conversation and try and put it as much as you can in order just the way it happened.

A I said that Louie wasn't living up to his commitment as far as purchasing the 14,000 shares of stock and that Louie had suggested that if I go to Johnny that Johnny and Hickey could get us approximately $200,000 in loans to be able to pay for the stock.

And Hickey said -- first he wanted to know how much money I was making on the original purchase of the stock.

I told him 4-3/4 a share.

Q You mean 4-3/4 dollars a share?

A Yes, $4.75 a share.

Johnny told him half that money had to go to Kelsey and Company, so it was half the money left, 2-3/8 a share.

So Hickey said that he didn't want to know where the other half went, that on any stock Louie purchased he was entitled to 2-3/8 a share.

Q When you say he was entitled to 2-3/8 a share, who was Mr. DiLorenzo referring to, he, Mr. Ostrer or both?

A Both.

THE COURT: Are DiLorenzo and Hickey one and the same person?

THE WITNESS: Yes, sir.

A Then Hickey asked me, how much is the minimum amount of money that I could get away with using, they had to get me to use to tide the deal over.

I told him the minimum was $60,000, and I explained to Hickey the reason forthe $60,000 was that

Louie had 5000 shares of stock to pay for at Bruce and I was getting a lot of pressure from Soldano about why Bruce didn't have his money and I wanted to relieve that problem from my mind first.

And Hickey told me Louie couldn't handle the purchase of the whole 14,000 shares of stock, that we reduce his position to 10,500 shares of stock and he would only have the deal with me, the 50 per cent profits, on 10,500 shares of stock.

Q Let's stop there and go back over it for a second and get some things cleaf, Mr. Hellerman.

You spoke about some money, and I think you said 2-3/8 which was to -- tell us, what was to happen to that 2-3/8 dollars per share according to the discussion that you had?

A Well, I told Hickey that I was earning 4-3/4 a share or $4.75 a share on every share of stock that Louie bought. So HIckey said he was entitled to half that, or 2-3/8 a share. And Hickey and I, when we made the fix, Hickey said that he wanted -- if he could get me a loan of $60,000 and Mr. Ostrer -- Louie would pay for the rest of his stock up to $10,500 shares, then a week later after settlement day I would give Hickey 2-3/8 a share on he 10,500 shares of stock.

It came out to $24,000-some-odd.

Q And did you make that agreement then and there?

A Yes.

Q What else happened during the course of this discussion?

A I told Hickey I needed the money yesterday, I needed it right away, and he said he can't get it that fast, it would have totake the weekend for him to get me this money. He told me the interest rate on the money.

Q What did he tell you ?

A A point and a half a week.

Q What do you mean by a point and a half a week?

A $900 every week on the $60,000. Hickey left the impression --

MR. GOLDBERG: I move to strike that.

THE COURT: Sustained.

Q No impressions, please. What did he say?

A He said to borrow this money, it wasn't coming from his pocket and that was the rate he was being charged, one and a half per cent a week. That is the agreement that was made.

Q And let's get it clear. During the course of the discussion, were you and Mr. Dioguardi and

Mr. DiLorenzo and Ostrer present at all times?

A To the best of my recollection -- someone may have gone to the men's room or something, but to the best of my recollection, yes.

Q Now, sir, you have told us about receiving some $30,000 from Soldano as part of your front money, what you have referred to as your front money.

A Yes.

Q Did you receive any more of your front money?

A Yes.

Q Approximately when?

A A week later.

Q A week later thanwhat?

A Than the time the deal started about March 9th or 10th. The 15th, 16th, 17th, somewhere in that area, Soldano gave me a check from Lincoln Securities totalling around $77,000. The stock had already been purchased now, he got paid from Lincoln for selling the stock and towards my $5 a share he gave me a check for $77,000.

Q How many checks were there, do you remember?

A Yes. Three checks.

Q Do you remember anything about the checks?

A They were from Lincoln Securities and I took the checks to Louie --

Q Wait. Let's go one step at a time, Mr. Hellerman. Who were the checks made out to, do you remember?

A No. It was eithrr one of Goodman nominees or Goodman's wife or Soldano's mother or one of their nominees.

Q I show youwhat has been marked for identification as Government's Exhibits 48, 49 and 55, sir. Do you recognize those? Just tell us yes or no. Look at the front and back.

A Yes.

Q What are those documents?

A These are the checks that Soldano gave me for part of my front money.

Q Do you remember without looking at the checks on what date or dates he gave you the checks?

A I say around between the 15th and 17th, around that time.

Q Would looking at the checks themselves refresh your recollection?

MR. EDELBAUM: I object to it.

THE COURT: I will allow it. Take a look at the checks if you need to refresh your recollection.

A The checks are dated March 17.

MR. GOLDBERG: I move to strike it.

THE COURT: Strike it.

A Yes.

Q Is your recollection refreshed from looking at the checks?

A Yes.

Q When did you get them?

A On March 16 or 17.

Q Now, Mr. Hellerman, what did you do with the checks after you got them?

A Brought them to Mr. Ostrer, brought them to Louie, and I wanted --

Q Did you have a discussion with Mr. Ostrer at that time?

A Yes.

Q What was the discussion that you had with Mr. Ostrer? Tell us what you said and what he said.

A I asked Louie if he would cash the checks for me. The first thing he did was pick up the phone and call a Hempstead bank or a bank in Hempstead to see if the checks were good. He told me that two of the checks were good and one wasn't, there was insufficient funds or uncollected funds, so he couldn't do anything with the one but he would be able to do something with the other two checks.

Q Was there any further discussion between you?

A Right. Louie owed -- had purchased 5000 shares of stock at J. M. Kelsey & Company.

Q That is Belmont stock?

A Belmont Franchising. It wasn't paid for yet. His holdings were reduced from 14,000 shares to 10,500 shares. So Louie took the two checks and he cashed it, got a bank check for 52,500 or 51,000, the purchase price of the 3500 shares, which was reducing his holdings, and he gave it to Stevie Schoengold at J. M. Kelsey & Company to pay for the 3500 shares of the 5000 he had bought at J. M. Kelsey & Company.

Q Let's see if we have it stright. You gave Mr. Ostrer checks totalling some $76,000 or $77,000?

A Correct.

Q And, to your knowledge, Mr. Ostrer took the proceeds of those checks and paid for stock at Kelsey?

A Part of the proceeds, $52,000-some-odd.

Q That leaves an amount left over of some $24,000-odd, does it not?

A Yes, it does.

Q Did you have a discussion with Mr. Ostrer as to what was to happen to that $24,000-odd?

A That day, when I had the discussion with him, Mr. Ostrer said as soon as the check was good he would cash it for me and give methe cash. Subsequently, the check wasn't good for a time after, and I promised I would give Hickey his $24,000 a week after he had given me the $60,000. So I told Louie to keep the balance for Hickey. So I never got it. That paid of Hickey's 2-3/8 share on 10,500 shares.

MR. MC GUIRE: We offer these checks.

MR. GOLDBERG: Subject to connection, I understand, your Honor.

THE COURT: No, that is not my ruling.

MR. GOLDBERG: I object to it, your Honor.

THE COURT: Received.

MR. EDELBAUM: I haven't looked at them yet. I object particularly to two of them, your Honor, on theground that the face of it is not decipherable.

THE COURT: Let me see you at the side bar for a minute.

(At the side bar)

THE COURT: Are you objecting to these checks on the ground of authenticity?

MR. EDELBAUM: I am objecting, your Honor, on the ground I can't read them.

THE COURT: If that is your objection, your objection is overruled.

MR. EDELBAUM: And I object on those two checks on the ground of authenticity. I must in view of the condition of the checks.

MR. MC GUIRE: This comes as a complete surprise. Mr. Edelbaum has had a chance to examine these checks, his client examined them in my office. It was my understanding that Mr. Edelbaum was not going to object to any documents on the ground of authenticity. We can make arrangements by subpoena to the appropriate bank to obetain the originals of the checks and I will undertake to do that but I don't think that ought to hold up the proceedings.

MR. EDELBAUM: Just a moment. If it will be developed -- if it can be developed through this witness or representation by the government who these checks were payable to, then there wouldn't be any problem, Judge. I amnot trying to do anything that is improper.

MR. GUIRE: Exhibit 48 is payable to Vito Soleno and endorsed on the reverse with the signature of Vito Soleno.

Exhibit 49 is payable to Lillian Wilshinsky and endorsed on the reverse Lillian Wilshinsky.

MR. EDELBAUM: If that's been told to me, that is sufficient.

THE COURT: Received.

(In open court)

(Government's Exhibits 48, 49 and 55 were received in evidence)

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MR. MC GUIRE: May I, your Honor?

THE COURT: You may.

MR. MC GUIRE: Ladies and gentlemen, Exhibit 48 is a photographic copy of a certified check drawn on the Hempstead Bank on the account of Lincoln Securities. It's dated March 17, 1970, and it is payable to Vito Soleno. On the reverse it is endorsed Vito Soleno and beneath that endorsement is the endorsement Henry Brown and a number, 1112-747-3.

The bank stamps on the reverse side show the check was paid on March 20. The date of the check, if I didn't say it before, is March 17.

Exhibit 49 is another check drawn on the same bank by the same company, Lincoln Securities. It is in the amount of $28,010.75 -- I guess I didn't say what the first one was. That is payable to Vito Soleno in the amount of $7,371.25.

Exhibit 49, as I said, is payable to Lillian Wilshinsky in the amount of $28,010.75, endorsed on the reverse Lilliam Wilshinsky, underneath that is the endorsement Henry Brown, and an account No. 1112-747-3, th bank stamp on the reverse side shows pa[illegible] March 20, 1970.

Exhibit No. 55 is an original check uncertified drawn on Lincoln Securities at the same bank, the Hempstead Bank. It is payable to Marilyn B. Goodman in the amount of $41,279. It shows an endorsement on the reverse side -- I beg your pardon. It's date is March 18, 1970. The endorsement on the reverse side says Marilyn B. Goodman. Underneath that there is the signature Henry Brown and the account No. 1112-747-3. . The bank stamp shows deposit on March 19 and payment on March 23, 1970.

MR. EDELBAUM: May I ask your Honor to inquire, Exhibit 48, Mr. McGuire told the jury, was a certified check. Exhibit 55 was uncertified. He didn't describe Exhibit 49. I would ask whether it was certified or not.

MR. MC GUIRE: My omission. Exhibit 49 shows on its face it is certified.

Perhaps I have gone through this quickly, I might pass these among the jury, your Honor.

(Handed to jury)

Q Mr. Hellerman, do you know who Henry Brown is?

A Yes.

Q Who is he?

A Check cashier and a factor.

Q How didyou come to know Henry Brown?

A Mr. Ostrer introduced me the first time.

Q Now, sir, you say that you had this conversation with Mr. Ostrer and Mr. DiLorenzo and Mr. Dioguardi at Pier 52?

A Yes.

Q Did you give Mr.Ostrer these three checks before or after that conversation?

A After.

Q Now, with reference to the date of the checks, sir, can you tell us when the conversation with Ostrer, Dioguardi and DiLorenzo at Pier 52 occurred?

A Between -- working backwards, between March 16 March 13 or 14, around that general area.

Q. You told us that at that meeting at Pier 52 an agreement was made to advance $60,000.

A Right.

Q Was that $60,000 ever advanced?

A Yes, it was.

Q When?

A The Monday after the meeting at Pier 52 I was supposed to be in Johnny's office --

MR. EDELBAUM: I don't hear.

A The Monday after the meeting at Pier 52 I got to Johnny's office about 10:30. I was supposed to be there 10 o'clock. I got there 10:30.

Q Did a discussion ensue between you and Mr. Dioguardi?

A Johnny said, "I know you are late when you have to give money but you are late when you have to get money, too."

He made like a joke out of it. Jerry DiLorenzo was there.

Q Who is Jerry DiLorenzo?

A Anthony DiLorenzo's brother. He had $60,000.

Q A check?

A In cash.

Q Did he give you those monies?

A Right.

Q And where did this take place? Where did this money pass?

A In Johnny's office.

Q Where is that office again?

A 29th Street and Fifth Avenue.

Q What did you do with the money?

A I took it from Johnny's office to Bruce & Company and I gave Bruce $38,000 of the $60,000 to pay for part of the purchase of Louie's stock at Bruce & Company.

Q And the entire amount of cash was some $60,000, was it not?

A Right.

Q Do you remember what you did with the remainder?

A I gave $22,000 to Soldano.

Q Now, had there been previous dealings between you and Soldano with respect to that $22,000?

A Yes.

Q Can you explain to the Court and jury what those previous dealings were?

A I borrowed $25,000 from Bruce Halpern and Soldano okayed me borrowing the $25,000. And so I said I would pay it back in about a week. Soldano told Bruce, "Don't worry about Mike's 25,000" --

Q Was this in your presence?

A "I will take care of it."

He told me before I went in I should give him the excess, which was $22,000, I should give that to him and he would straighten out with Bruce, he would pay Bruce off my loan of $25,000.

I accepted it that way, because he had to sign a release, because previously, before, I brought the $60,000 in cash, I had gotten a bank check from a bank, the Amboy Savings & Loan in New Jersey, a bank which I was very close to the principals, and the owner of the bank gave me a bank check without me having the funds or anything available. I promised I would cover the $60,000. And I brought that bank check to Bruce and when I didn't cover the $60,000 in the Amboy Savings & Loan, Mr. Patras had stopped that bank check.

Q Who is Mr. Patras?

A He was the director or owner of the Amboy Savings & Loan. He is an attorney. He stopped that bank check. So Bruce didn't have the $60,000 payment and I didn't get the $60,000 fast enough from Hickey to cover the $60,000 in the bank. So when I brought the $60,000 to Bruce's office, I gave him 38,000 and Soldano told him, "Don't worry about the difference."

Bruce called Louie and Louie said that he would pay for the rest --

Q Wait. Bruce called Louie in your presence?

A Right.

Q Did you hear Halpern's side of the conversation?

A Yes, sir.

Q Did you hear Ostrer's side of the conversation?

A No, sir.

Q What did you hear?

A Bruce Halpern asking Louie if it was okay that he is only accepting $38,000 and would Louie -- Louie had to pay an additional $37,000 to Halpern wanted to know if he was going to get the $37,000 from Ostrer, meaning the $22,000 I shorted him when I brought him the 60, and the 15,000 for the extra thousand shares to be paid f at Bruce. The total purchase price of the 5000 shares was 5000 times 15 or $75,000.

I didn't hear Louie's conversation but Bruce said, "It's okay, Louie said he is going to pay me the balance of the money."

Q Now, sir, you say that -- I will withdraw that.

Can you remember the exact date on which this conversation that you just related at Bruce Halpern's office took place.

A I couldn't give you the exact date.

Q Would refereence to a calendar help you?

A It might.

MR. MC GUIRE: May I have permission, your Honor, to show the witness a 1970 calendar?

THE COURT: You may.

Q Please take a look at that, sir.

THE COURT: Mr. Edelbaum, your voice is carrying.

MR. EDELBAUM: I apologize.

Q Can you tell us by reference to the calendar when this happened?

A I think it was the 23rd of March.

Q Now, subsequent to the 23rd of March, did you continue to have discussions with Mr. Dioguardi and Mr. Ostrer?

A Subsequent, after?

Q After.

A After, yes.

Q With shom did you speak first, Mr. Diogurardi or Mr. Ostrer?

A I can't answer the question. I can't say either one.

Q You can't remember?

A I spoke -- I was with them so much I can't put it in order.

Q Did you have other business dealings with both of them?

A Yes.

Q Can you tell us what these dealings were?

A I was in the process of getting an insuranc policy from Louie, I was producing a show with Louie, the Boyfriend.

Q A Broadway show?

A Right. Louie had given me three or four different deals. He had a condominium he was buying in Casa Del Sol in Spain, he had a red herring on -- a prospectus, he was putting a horse farm public. He had a lot of deals. He was discussing them with me.

Q And did you have other business dealings with Mr. Dioguardi as well?

MR. GOLDBERG: Your Honor, may I approach the side bar?

THE COURT: You may.

(At the side bar)

MR. GOLDBERG: I see the same dangers as before, yesterday, when the same kind of open-handed question was put to the witness: Did you have other dealings with the defendant Dioguardi? We all know there were other stock swindles taking place at around that time. The end of Imperial was in February. There were other stock deals. Are we going to get into a situation where he blurts out through nervousness he was involved with other stock manipulations with the defendant Dioguardi?

MR. MC GUIRE: The answer is no. I spent 15 minutes last night specifically instructing the witness.

MR. GOLDBERG: May we have an offer of proof?

MR. MC GUIRE: Yes.

MR. GOLDBERG: I am asking the Judge.

MR. MC GUIRE: I am happy to provide it. My understanding is that the witness will testify that about this time he had some dealings with Dioguardi with respect to his house, that he had a joint investment with Dioguardi in the Broadway show and thatthey purchased a keychain company together.

MR. GOLDBERG: Most respectfully, your Honor, I submit there is no relevance to this material. It gets us into collateral issues as to whether those were bona fide deals or not, whether those were -- what is the relevance of these other business dealings between the two? Does the goverment claim there was wrongdoing i connection with it? Then it opens it up to other crime If the government claims there is no wrongdoing in connection therewith --

THE COURT: Briefly indicate the relevancy.

MR. MC GUIRE: So far as we are concerned it simply provides a reason why the witness was unable to pinpoint specific conversations at specific times. He had so many other dealings and so much money was passing through his hands in connection with these variou deals that his memory about specific conversations is a little blurred.

MR.GOLDBERG: Your Honor, can I say this in conclusion? I will represent that I will make no inquiry on cross-examination that will raise any issue as to his inability to pinpoint dates or the confusion in dates so that we don't have to get into this. I submit on redirect, if I should in any way raise any question about his lack of memory or his inability to pinpoint time and place, that then it would be appropriate for Mr. McGuire to come back on redirect.

MR. MC GUIRE: Satisfactory.

MR. EDELBAUM: I don't want to be bound by that because as far as I am concerned there are certain dates that -- there seems to be confusion as to certain dates.

THE COURT: Then you go ahead.

MR. GOLDBERG: Do you say, Maurice --

MR. EDELBAUM: Only with respect to my client.

MR. GOLDBERG: I will not touch on his difficulty.

MR. EDELBAUM: I try my case alone.

MR. GOLDBERG: I will not go into this difficulty with reference to the defendant Dioguardi.

THE COURT: You won't raise on cross-examination any aspect of the date history concerning the transactions and conversations testified to by Mr. Hellerman with Mr. Dioguardi, is that what you are saying?

MR. GOLDBERG: Difficulty as to time and place none at all. I make that commitment, your Honor. That can easily be redressed by redirect.

MR. MC GUIRE: One other matter. It may be that the witness will also testify that as he -- in fact, I think it will that the witness will testify that he was receiving money from the Belmont deal during the course of April 1970, as a result of the various split profit arrangements that he had made with others, and I believe his testimony will be that as a result of accum lating some money from those deals he made joint investments in which he put up a portion of Dioguardi's shares.

However, since the witness was engaged in so many activities with respect to these two men at the ti he cannot be sure what proceeds he put where.

THE COURT: Let's think about it in practical terms, particularly as it relates to your last statements by way of offer of proof. I would say that you are entitled to a ruling that you can adduc that testimony, but practically isn't it cumulative? Haven't you gone about as much as you need to in that area?

MR. MC GUIRE: Well, maybe I will just shortcut it, your Honor, and ask the witness, if this will solve the problem, a summary question as to whether he accumulated any other money as a result of the Belmont deal and whether he used any of that to the benefit of Dioguardi. I anticipated an objection from Mr. Goldberg on that ground, which is the reason I was going around the long way.

THE COURT: Will you accept that?

MR. GOLDBERG: And then go into details.

MR. MC GUIRE: I would be happy to leave it that.

MR. GOLDBERG: All right, I will leave it at that.

THE COURT: I assume that there is no question that you are going to inadvertently in any way fail to keep this agreement on cross-examination.

MR. GOLDBERG: Of course not.

MR. EDELBAUM: Your Honor, I understand that any joint investment of theproceeds was with Mr. Dioguardi and there is no contention he is going to testify as toany joint investment from these proceeds with Mr. -- putting up any money for Mr. Ostrer or anything like that.

MR. MC GUIRE: That's true.

MR. EDELBAUM: Then I am not concerned about that.

(In open court)

5/1 am (In open court.)

Q Mr. Hellerman, I am going to withdraw the last question and ask another one.

From the end of March on did you have occasion to accumula-te funds as a result of your participation in this Belmont manipulation?

A I can't answer that question yes or no. I don't understand what you mean.

Q You don't understand the question?

A No.

Q You have told us various arrangements you had made with various individuals, the substance of which, if I am not mistaken, is that you would split profits with them and that you would guarantee them against loss. As a resul of any of those arrangements did you, in fact, split profits with any individuals?

A Yes.

Q Can you give us your best recollection as to how much money you obtained as a result of that?

A 70, 80,000 dollars.

Q . Now, sir, do you remember what you did with that money?

A Yes.

Q Specifically?

A Yes. I know where I put the money, where I invested the money, where I put the money, who I gave it to, most of it.

Q Can you tell us that, sir?

A I put some money into The Boy Friend, which was a show I produced with Louie on Broadway. I made an investment with Johnny in a key chain business -- I think the name was Hargo Creations, in which/ Seymour Sadev was the principal. Johnny and I bought a percentage of the business in Steve Murray's name, and Mr. Patras was the lawyer that handled the transaction.

I gave my girl friend, who is now my wife, $15,000 to buy a house. I arranged a mortgage loan for Johnny on a house in Mahopac for $35,000.

Q Do you remember, Mr. Hellerman, whatproceeds you used for each of these transactions specifically?

A Will you please repeat that question?

Q Do you remember specifically what proceeds you used for each of those transactions that you have described to us?

A Well, except for the transaction on The Boy Friend, which might have overlapped, the proceeds came from the manipulation that I was doing in Belmont Franchising.

Q You have told us, sir, about arrangements that you made to insure the payment of money to two brokers, Kelse and Bruce, for stock that had been ordered in the name of Louis Ostrer?

A Yes, sir.

Q Now, to your knowledge did Mr. Ostrer pay for a of the remaining stock which he had ordered?

A He told me he paid for the 1500 shares at Americ Global and the 500 shares at Alger.

Q Yes?

A You asked me what he paid for.

Q You spoke earlier about an order of stock at Eastman Dillon?

A That stock was not paid for.

Q Do you know what happened with respect to that order?

A The stock was sold out.

Q How did you come to be in possession of that knowledge?

A Mike Caricato from Hyer & Lowe called me --

MR. EDELBAUM: I object to what he said to him.

MR. MC GUIRE: Would your Honor wish to hear me?

THE COURT: I don't really think I need to, but I will hear you at the side bar.

(At the side bar.)

MR. EDELBAUM: Am I in error that Mike Caricato is not a defendant?

MR. MC GUIRE: He is a defendant.

THE COURT: He is a named defendant.

MR. EDELBAUM: I withdraw it.

MR. GOLDBERG: I want a side bar conference. He said he paid money on the mortgage of the house in Mahopac. The documents show that it was paid in October or November of '69 before the Belmont deal out of the proceeds of the Imperial deal.. So it's a double-edged sword for me to go into it with him, because his response, quite probably if I accept the government's proof in Imperial despite the verdict, that this represented funds given to Dioguardi out of the Imperial deal. October and November is a way before the Belmont deal. But how could that possibly be covered by me without opening the whole door to the Imperial situation.

Query, if I can ask the prosecutor to double check on that, the dates, shouldn't that really be stricken?

Have I made myself clear? I am troubled with it without opening a Pandora's box and spilling . I have the documents with me.

MR. MC GUIRE: My response, your Honor, is that so far as I know the witness believes he is telling the truth here, and no perjury has been committed or suborned. I dor see where it is my obligation to correct a mistake. I will accept Mr. Goldberg's characterization that it is a misstatement.

THE COURT: The answer is in the frame of referenc that he used proceeds from Belmont Franchising Corporation to make these various payments, distributions and disburseme and that is the witness' testimony, and that is his belief and that is his answer.

MR. MC GUIRE: I think Mr. Goldberg is free to cro examine.

MR. GOLDBERG: I know I am and, therefore, open the door to Imperial.

MR.EDELBAUM: Might I say if the prosecutor has knowledge that the witness is incorrect, doesn't he have an obligation to correct it, your Honor?

MR. GOLDBERG: I have the documents.

MR. MC GUIRE: I thought I made it clear that the prosecutor did not have such knowledge.

MR. GOLDBERG: I have the documents.

THE COURT: Will you show Mr. Mc Guire the documen and perhaps to the extent of his statement about the mortgag it can be corrected by the witness without, of course, providing you with an opportunity to make any point of it either on cross examination or summation.

MR. GOLDBERG: I don't want to make any point of it.

MR. EDELBAUM: Thank you, your Honor. Then I withdraw my objection. I was in error.

(In open court.)

BY MR. MC GUIRE:

Q You were about to tell us about a conversation you had with Michael Caricato.

A He called me and was reporting to me about what stock was on the street or what stock was not on the street and he told me.

THE COURT: What do you mean by that?

THE WITNESS: If anybody sold stock, if any brokerage houses sold stock at the market. He was a trader in the sheets, a trader in the stock, and he called me one day and he told me that Henderson & Company had offered him, offered Caricato -- Henderson is one brokerage firm -- they offered Caricato, with Hyer & Lowe -- 2,000 shares of stock.

Q Belmont Franchising stock?

A Belmont Franchising stock. And I told him to stall them, and Henderson had bought 200 of the shares, and then I met with Caricato and I told him, I convinced him to buy the stock, that the stock was going to go up, to get i off the market, and the next day he called up Henderson an he wanted to buy.

Q Did he tell you that he had done this?

A Yes. And I was working with him while he was doing it on the telephone, and he called up Henderson to buy the 2,000 shares, but Henderson would only sell him 1800 shares, because Henderson had been short 200 shares when e bought it from Eastman, Dillon, and Eastman, Dillon had sold out the stock because it was not paid for.

Q To make a long story short, you convinced Caricato to pick up shares that had not been paid for by Ostrer? Is that the sum and substance of it?

A Right.

Q Do you know whether Mr. Caricato paid for those shares?

THE COURT: What is your answer? Do you know of your own personal knowledge?

A My best recollection is that he paid for them.

Q Now, you told us that Mr. Ostrer had ordered or that you had ordered for Mr. Ostrer some 5,000 shares at J.M. Kelsey & Company, and you also told us about a series of transactions as a result of which you furnished the mon y to pay $52,500 towards the purchase of those shares.

A Correct.

Q Was that the entire purchase price of those 5,000 shares?

A No.

Q What was the balance remaining, due on the 5,000 shares?

A 22 some odd thousand. 1500 shares times $15 a share, about 22,000.

Q Did you make any arrangements with Mr. Ostrer about payment for those shares?

A I talked to Mr. Ostrer, to Louie, about paying for them, and he kept stalling me. So what I did, I had my brother-in-law unbeknownst to Mr. Ostrer buy 1100 shares and other customers come in and pick up the stock, and I told Louis, I said, "Instead of you and I splitting 50 per cent of the profit on the stock, you get 25 per cent and I will get 25 per cent and the people that I am putting in the stock will get 50 per cent," and he was happy that I did it because he didn't have to come up with that money.

Q So what happened to those 1500 shares which had been ordered at Kelsey and for which Mr. Ostrer never paid?

A So they were sold out of one account of Kelsey, Louis Ostrer's, to other customers of Kelsey's.

Q And that was before they were ever paid for?

A Right.

Q Do you remember who it was who bought those shares?

A Not specifically. I know my brother-in-law bought 1100 shares and I sold a total of 2600 shares in thi account. So I can't specifically say which offset what. But in my mind my brother-in-law, the 1100 offset --

MR. EDELBAUM: I move to strike out what was in his mind.

THE COURT: Yes.

Q Don't tell us what was in your mind. Just tell us about conversations and events that took place.

Have you finished?

A 1100 shares that I sold my brother-in-law and othe customers, for a total to sell out 1500 shares of that account plus an additional 1100 shares.

Q Did you make any financial arrangements with Mr. Ostrer with respect to that series of transactions?

A Yes, 1500 shares I told Louie that I was selling the stock to another customer, he didn't have to come up with the money and he would have only a 25 per cent in the stock and I would have that, and the new principal coming in the stock would have 50 per cent, and then I sold 2600 shares out of that account, and I gave Stevie Schoengold -- Stevie Schoengold had a check, and the difference of the check was

$18,000.

Q Whatdo you mean by the difference in the check? You're going a little fast here.

A Well, the 1500 shares was not paid for. So when you sell out 2600 shares, J.M. Kelsey is not going to pay Louie Ostrer for 2600 shares. 2600 shares less the 1500 that were not paid for, or 1100 shares.

Q Let's do the mathematics if we can. How much did Mr. Ostrer owe to pay for 15-0 shares of stock?

A 15 times 1500. 1500 times $15 a share, which would be like 22,500 dollars,plus commission.

Q And you say that you made arrangements for the sale of some stock?

A Right.

Q How much stock did you arrange to sell?

A 2600 shares.

Q And at what price, if you recall?

A Around the same price,$15-- it could have been 16 or 17, but around$15. But take a $15 figure. I think you will see the mathematics work out.

Q Is it your testimony then that you or Mr. Ostrer were entitled to money for the difference between 2600 and 1500 shares?

A Correct.

Q Was it just your testimony that the check for th difference had to be made out to Mr. Ostrer?

A Well, I had paid for the stock, 3500 shares, in his name. So it was sold out of that account.

Q It was sold in his name?

A Right, and Stevie Schoengold wouldn't give me the check. He went to the First Israel Bank. He met Louie Ostrer there.

Q Is that what he told you?

A I was there. I was standing right behind him. And Lloyd Edelstein was my banker. He used to sit on the left, and I think the name of his banker was Donofrio -- I am not sure of his name -- he had just come from another bank, he was sitting opposite Mr. Edelstein, and that is who Louis was doing business with, and Louie was sitting at his desk, and Schoengold went over to him and had him endorse the check.

t3/5 am Q To whom?

A To Louie Ostrer, had him endorse the check at the First Israel Bank and then cash the check and gave me the cash.

Q I show you Government's Exhibits 86 and 87 for identification. Will you take a look at these, please?

A Front and back?

Q Front and back. Can you identify those documents?

A Yes.

Q What are they?

A These are the checks that were made in Louis Ostrer's name from J.M. Kelsey & Company.

MR. MC GUIRE: We offer them in evidence.

MR. GOLDBERG: Objection.

MR. EDELBAUM: Your Honor, may I make some inquiry of Mr. Mc Guire through your Honor of something that appears on here?

THE COURT: You may.

MR. EDELBAUM: We have agreed that a certain writing on here will not be offered.

THE COURT: Very well. Received.

(Government's Exhibits 86 and 87 were received in evidence.)

MR. MC GUIRE: Just so the record is clear, there is a writing in the top right-hand corner of each of these checks with the date of 11-13-70, which is considerably after the transactions which we are speaking about here. That writing is no part of the government's offer of this proof.

THE COURT: Do you accept that?

MR. EDELBAUM: Yes, your Honor.

BY MR. Mc GUIRE:

Q Mr. Hellerman, you said these were the checks that were made out to Mr. Ostrer?

A Correct.

Q Did you see Mr. Ostrer endorse those checks?

A Yes, I did.

Q And what happened after that?

A The checks were cashed at the First Israel Bank and I got the cash.

MR. MR. MC GUIRE: Government's Exhibit 86 is a check drawn on J.M. Kelsey & Company at the First Israel Bank & Trust Company, dated March 31, 1970, payable to Louis M. Ostrer in the amount of $3,570. It is signed John M. Kelsey, and on the face of it is the notation Paid First Israel Bank & Trust Company, March 31, 1970.

On the reverse side is an endorsement stamp "Pay any bank Bankers Trust Company, New York, New York," without a date.

Q So far as you know, Mr. Hellerman, was there any part of this transaction carried on at the Bankers Trust Company?

A The First Israel cleared through Bankers Trust Company. That is the reason it was endorsed. First Israel was not a clearing bank. It cleared through another bank, so all their checks go through the Bankers Trust Company.

MR. MC GUIRE: Exhibit 87 is another check, same date, drawn on the same firm, J.M. Kelsey & Company, on the First Israel Bank & Trust Company, payable to Louis C. Ostrer, in the amount of $15,000, endorsed on the reverse side in the same fashion and paid March 31, 1970.

Q Did you have any discussion with Mr. Ostrer with regard to the sell out that you testified to of 2,000 shares from the brokerage firm of Eastman, Dillon?

A Yes, sir. I don't remember the exact discussion, but the transaction was made up somewhere along the line.

Q What do you mean the transaction was made up somewhere along the line?

A Well, you take the 3500 shares that I paid for, the $52,500 that I gave Mr. Ostrer to pay for, that left him ten five.

Q That left him 10,500 shares that he was supposed to pay for?

A That is right. 2,000 from Eastman, Dillon, 500 at Alger, 1500 American Global, 1500 at Kelsey and 5,000 from Bruce, left him 10,500 shares.

Now, the 1500 shares at Kelsey he never paid for. I got other customers to pick it up.

Q And you just testified to that?

A Right.

Q And that was the transaction on which you got these two checks, Exhibits 86 and 87, signed by Mr. Ostrer, and you got the cash proceeds?

A Right.

The 2,000 shares at Eastman, Dillon which were no paid for, it didn't affect the front money that I got, because we got paid, Soldano and Goodman got paid from the brokers they sold them out through.

So at that point it didn't affect anything in the transaction.

But somewhere along the line 2000 shares that were sold out, it was made up by Mr. Ostrer in paying, when he paid, if he paid Bruce the 22,000 extra, or how I don't specifically remember, but the 2,000 shares was made up, because when we settled up at the end how much money was owed to Mr. Ostrer, if it had not been paid up I would have deducted that $30,000.

Q Do you remember any transaction in which Mr. Ostrer eventually paid for those 2,000 shares? Do you remember any specific transaction?

A The best of my knowledge was the 22,000 of it that he made up to Bruce. If you remember, when I brought the $38,000, rather than the $60,000, Mr. Ostrer made up that $22,000 there, and I just can't remember where the other

$7500 or $8000 was made up.

Q Well, I ask you to answer yes or no: Did you make an arrangement with Mr. Ostrer for the payment for those 2,000 shares which were sold out at Eastman, Dillon and picked up by Caricato? Did you make some arrangements with Mr. Ostrer concerning that?

A Yes, sir.

Q Do you remember specifically as you sit here now what that arrangement was?

A Part of it, but not the whole thing.

Q We have gotten up to approximately the end of March, Mr. Hellerman. At that time was all of the stock that you and Mr. Ostrer had ordered paid for?

A Yes.

Q And at that point, Mr. Hellerman, what did you do with respect to the Belmont Franchising stock?

A I jiggled the price to $30.

Q How did you jiggle the price?

A There are traders in the sheets making a market, and every day I would tell them to make the price of the stock higher, to make a few trades in between to show some degree of activity in the stock, and then the stock just -- when you have all the stock you make it any price you want to make it.

Q You gave orders to brokers?

A Either me directly or me through Schoengold or me through Matty Russo or me through somebody.

4 Q You gave orders to brokers to buy the stock?

A To buy it and sell it, whatever had to be done.

Q Did you set the prices at which the stock was to be bought and sold and so forth?

A Yes, sir.

Q You did that either director or through Schoengold or Russo? Is that your testimony?

A Yes.

Q We have not heard about Matty Russo before. Who is he?

A He was a broker that I met about a year previously that used to work for a firm in Jersey and then he came to work for me, and he used to work in my office and I gave him a job keeping in touch with the brokers and seeing that the market was run right.

Q You say you jiggled the price up from $15 to $30 per share. How long a period of time did that take?

A . Not too long. A couple of weeks. The middle of April. The second week of April. The stock was 27, 28, 30, like that.

Q Did you do anything further with respect to the

Belmont stock after that period of time had passed?

A Yes.

Q What did you do?

A In April I went to Florida for Passover and I started to get very nervous.

MR. GOLDBERG: I move to strike it.

THE COURT: Strike it.

Q Don't tell us the state of your emotions; just tell us what you did.

A I wanted to make sure --

MR. GOLDBERG: I move to strike it.

THE COURT: Strike it.

A -- I made arrangements for the $60,000 that was owed to Hickey to get paid off, and I did that by having Scott Ellison buy 2500 shares of Belmont Franchising in Florida, and he bought some through J.S. Love & Company and some through A.J. Cano & Company, and Scott Ellisson and I convinced Murray Passman to buy 500 shares. I think the firm was Oppenheimer -- not Oppenheimer -- I forgot the name.

Q Who is Ellison and Passman?

A Ellison lived in the Bar Harbor House.

Q Where?

A In Florida, where my mother lived.

Q In Miami?

A In Bal Harbor, and Murray Passman was a neighbor of mine in Rockville Centre for years and he also lived in that building and he knew me.

Q You made arrangements for those two people to buy some Belmont stock?

A Right.

Q What else did you do?

A When they bought the stock I called Louie.

Q Did you call him from Florida?

A I called him from Florida and I told him that he was selling 2500 shares of Belmont and he should make the arrangmeents who he is going to sell it through and what broker firm he was going to use to feed the market the stock, and I told him to make arrangements with Stevie, and I also told Stevie what had been done, and Louie sold out 2500 shares of Belmont franchising through American Global.

Q How do you know he did that?

A Louie told me he did. And then when I came back from Florida I told Johnny that $60,000 had been paid. He said, "What do you mean paid?"

I told him about the transaction.

Q Youtold him about what transaction?

A About the 2500 shares of Belmont that Louie had sold out.

Q And at what price had he sold them out?

A 26, 28, 30, in that price range, and the 2500 shares yielded a profit above the $60,000 that was owed to Hickey, plus all the interest that I had laid out, so there was enough money that Hickey got paid the $60,000, I got the interest I was laying out, the $900 a week back, and Louie and I split up about $1700 a piece on that transaction.

Q Now, do you know, sir, through what brokerage firm that transaction was carried out, Mr. Ostrer's sale of stock?

A Lou e told me American Global.

Q Do you know in what name it was carried out?

A I think Bill Kilroy, but I am not a hundred per cent sure. I think Bill Kilroy,and when I called Louie he said to me because of all the transactions we had on the stock he didn't have any stock, he needed to borrow some stock because he had placed some stock with friends of his to get the money to pay for the stock he didn't pay for. So he told me could I lend him 1100 shares, and I made Stevie lend Louie 1100 shares of stock to furnish his transaction, to give him 2500 shares to be able to deliver to be able to get the money.

Q You think that stock was sold out in the name of Bill Kilroy? Who is Bill Kilroy?

A He worked for Mr. Ostrer.

Q Had you had any previous dealings with Mr. Kilroy in connection with Belmont Franchising stock?

A In connection with Belmont Franchising --

MR. EDELBAUM: The witness is shaking his head. May we have an answer?

A No.

THE COURT: His answer is no.

Is that correct?

THE WITNESS: Yes, sir.

Q Did Mr. Ostrer at any time tell you about any dealings he had with Mr. Kilroy in connection with Belmont Franchising stock?

MR. EDELBAUM: I object to him leading, your Honor.

THE COURT: Refrain from leading, will you please.

Q Did youhave any conversations with Mr. Ostrer about the methods by which he was paying for Belmont stock?

A Yes.

Q Did Mr. Ostrer during the course of those discussions mention names of any persons?

A Yes.

Q Can you tell us what Mr. Ostrer said in that connection?

A Mr. Ostrer bought some stock in Dina Gelman's name.

Q Who is Dina Gelman?

A I don't know. It might be a sister, but I don't know for sure. In Bill Kilroy's name. And he bought stock while I was in the office and while he was buying the stock, called up a broker and, "Buy in this account," Dina Gelman or Kilroy or different names that I don't remember, but he didn't buy all the stock in his name.

Q Now, did Mr. Ostrer have any discussions with you with respect to how he raised the money to buy stock?

A Yes.

Q Can you tell us what he said and when these conversations took place, the best you can recall?

A After the meeting with Hickey where he decided to get the $60,000, Louie said he was going to lay off some stocks to friends of his and he would be able to get money that way. He mentioned Lee Evans; he mentioned Harry Morse; he mentioned Fred Flatteu; he mentioned somebody else, a whose name began with a K, but I don't remember his name. The only one I know here definitely laid off, he sold or made a deal with Fred Flatteu, because coincidentally I was sitting in Sam Weissman's office --

Q Have you finished telling us about how you informed Mr. Dioguardi about the transaction in which this 2500 shares of stock was sold?

A Yes, sir.

Q Did you tell us everything about what you told Mr.Gioguardi at that time?

A No. I told Mr. Dioguardi, I told Johnny that Louie owed me money, because the sale price was more than the $60,000 that was owed to Hickey, and I wanted to make sure I got the interest back and whatever the profit was, and Johnny said not to worry, Louie won't do me out of it, and as soon as the check cleared sent over the interest and the profit.

Q So Mr. Ostrer made good on his split profit deal with you with respect to that stock?

A Yes, sir.

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Q Now, sir, did you do any further jiggling of the market?

A Yes.

Q What did you do?

A I ran the price of the stock to 42, 48, 50. I think it even hit 50 or $51 at a time.

Q Do you remember exactly?

A $51 sticks in my head as the high.

Q Anyhow, you know you ran it past 30?

A Yes.

Q At approximately what time of year did this take place, sir?

A April, May, towards the end of the deal is when it hit its high.

Q You say towards the end of the deal. Did the deal come to an end?

A Yes.

Q Tell us how that happened.

A Well, I had Tepper from Newburger, Loeb buy some stock at 38, 44. I don't remember the prices. High levels.

Q Did you know them at that time?

A Know the prices, yes, sure. I was giving the orders. I told him to buy 4,000 or 5,000 shares that we knew the customer was not going to pay for the stock, but by him buying the stock, we were able to get out of stock.

It was a big board contract on the other side.

Q What do you mean you were able to get out of stock?

A In other words, if a member firm buys a thousand shares of stock or in this case let's say four or five thousand shares of stock, they are hooked on the contract. They have to pay for that stock.

So Soldano had stock. I got him out of a thousand shares, I got Winters out of a thousand shares of stock I got some of the customers at Kelsey out of their stock, I got Bodenstein out, I got Louis out, I got some of the customers out. This way we got paid on our side and the people that bought at Newburger, Loeb never had any intention of paying for the stock at Newburger, Loeb.

THE COURT: I think we will suspend at this point for lunch and resume again at 2:00 o'clock.

I am confident that I need not remind you of my earlier and repeated admonitions. You are not to discuss this case with anyone under any circumstances or allow this case to be mentioned in your presence. Should any incident or any statement be made to you which you think deserves my attention, err on the side of bringing it to my attention rather than not.

Do you understand?

(Jurors nod.)

THE COURT: 2:00 o'clock.

THE CLERK: Court stands in luncheon recess until 2:00 o'clock. Remain seated until the jury leaves the room.

(Luncheon recess.)

AFTERNOON SESSION

2:00 p.m.

(In the robing room.)

MR. McGUIRE: Mr. Goldberg has some things that he wants to place on the record here.

Over the course of the luncheon recess a couple of things have come to my mind which I would also like to place on the record.

May I begin?

THE COURT: Yes.

MR. McGUIRE: First, I spoke to the witness Hellerman during the recess and he says that he is positive that he knows and he believes that the defendant Dioguardi knows one of the jurors.

He cannot remember his name but he has identified the juror as Juror No. 3.

I thought that was a matter that had to be brought immediately to the Court's attention, and I would suggest that appropriate inquiry be made of the juror and I should think that as with voir dire examination at the beginning of the trial, the inquiry ought to be made under oath.

MR. GOLDBERG: I can represent as an officer of the Court that the defendant Dioguardi-- this does not foreclose the possibility that Mr. McGuire is correct-- the defendant Dioguardi never mentioned that to me and I am just thinking out loud that were your Honor to question him about whether he knows the defendant Dioguardi, it might cause him to bend over backwards, perhaps.

If there is any question about it, I would have no hesitancy in excusing him. I just don't want to be put in a position where if your Honor zeroes in on it that he in some way feels that he must act to vindicate himself.

I think-- I want to assure your Honor it comes as a complete surprise to me. .

MR. EDELBAUM: I recall distinctly one of the questions asked by the Court was whether or not any juror knows any of the parties, and we assume the juror told the truth.

Now, I have no objection to having the juror asked-- was Michael Hellerman named as a possible witness?

MR. McGUIRE: It was mentioned a juror should indicate if he knew him.

MR. EDELBAUM: That is true. If Mr. Hellerman says that he knows Juror No. 3 I wouldhave no objection just limiting it to the fact whether he knows Mr. Hellerman.

THE COURT: I don't see how I can possibly limit an inquiry of this sort. I think it must necessarily be as broad as may be necessary to elicit the sort of information that wo[illegible] give us all assurance that this juror does not know Mr. Dioguardi or Mr. Hellerman.

Isn't that what you are saying?

MR. McGUIRE: I think so, your Honor.

MR. EDELBAUM: I might suggest this, that in itself singling out a particular juror, that all of the jurors be asked the question.

THE COURT: I can't accept that proposition.

MR. EDELBAUM: To point out one person, what may happen there is prejudice.

MR. GOLDBERG: Should your Honor explore the possibility on voir dire with Mr. Hellerman as to the sources of his information?

THE COURT: I certainly think that that is the first step that is indicated. I think we have to have the benefit of his knowledge before we proceed in any other fashion.

MR. GOLDBERG: If your Honor finds that you are convinced that there is some basis for Hellerman's belief, rather than have you get into the kind of inquiry that I think would be prejudicial if the juror were to remain and recognizing that we have five other alternates -- is that correct, Mr. McGuire?

MR. McGUIRE: Yes.

MR. EDELBAUM: Who is the juror?

THE COURT: Bring my chart in, Rudy, please.

MR. EDELBAUM: I would like a description.

MR. McGUIRE: The name of the juror is Stanley Wolchock. He is the wig maker from Rockland County.

THE COURT: Are you ready for Mr. Hellerman?

MR. McGUIRE: Yes, your Honor, so far as that point is concerned, and I certainly subscribe to counsel's suggestion that that would be a good idea.

I have another matter to explore also.

THE COURT: Mr. Wolchock, Razel Avenue, Spring Valley, New York.

MR. GOLDBERG: Based just on the voir dire of Mr. Hellerman, I would ask your Honor if it would at all be possible to broaden the voir dire to include the closing statement with respect to this property up at Lake Mahopac which indicates that the money was advanced by Hellerman November 28th, some number of months prior to --

THE COURT: I don't see any point in developing that at all at this point.

MR. GOLDBERG: Your Honor, that money doesn't come-- well, may I make my statement on the record? I have documents in my hand--

THE COURT: Why don't we get through with one thing at a time?

MR. GOLDBERG: All right.

MR. McGUIRE: The other thing I wanted to place on the record, your Honor, has to do with the subject we were discussing at our last conference in the robing room, that is, the cross-examination of Hellerman.

It occurred to me that it might be unfair to the defense to leave them with the impression that the written deal, the written agreement, of last October or whenever it was is the only agreement that Hellerman ever had with the Government, because that is not the fact.

I would be willing at an appropriate time, although there are no documents to reflect it, to divulge on the record to counsel what the history of Hellerman's dealing with the Government has been for purposes of making sure that counsel are correctly and fairly informed on the subject.

MR. EDELBAUM: I wonder, your Honor, addressing myself to you and not to Mr. McGuire, why this wasn't divulged this morning so that any appropriate memorandum which I have ordered could possibly encompass that information which I think would be very relevant to this documented information.

I don't know why that was kept from your Honor and kept from counsel and just revealed now after we are diligently working to provide your Honor with a memorandum hopefully by late this afternoon.

MR. McGUIRE: Your Honor, I think I did say at our conference that the story of Hellerman and the Government is a long one and that I didn't see any point in going into the details at that.time.

Upon reflection over the luncheon recess I have concluded defense counsel quite properly would want to know and be entitled to know about that information.

THE COURT: Do you want to do that now?

MR. McGUIRE: Whenever it is convenient for your Honor.

THE COURT: It can be done right now.

MR. McGUIRE: My understand, and I get this information from others in my office because I was not personally involved, is that Hellerman began furnishing information to the Government on certain criminal activities after he was indicted in the Imperial case, and that was in the fall of 1970.

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The general understanding under which he operated was that he would furnish information to the Govern - ment, thathe would agree to plead guilty in the Imperal situation, that he would not testify in any case.

My understanding further is that he did provide information to the Government in a number of cases, including the so-called Carson case, in which he did not appear as a witness, and to some extent including the Belmont case, although he was not called as a witness before the grand jury.

He did plead guilty, as your Honor knows, in the Imperial case, and his sentencing was deferred.

It was a part of the understanding, so I am informed, that Hellerman would not commit any further criminal acts during the course of his cooperation with the Government and, in fact, would not commit any further criminal acts.

It is also my understanding, based on facts that have come to our attention, that he did not live up to that agreement, he did participate in further crimes and as a result of that, the Government concluded that he had not kept his part of the arrangement.

I believe he would be prepared to testify to all of these events, and he has personal knowledge of them, his lawyers have personal knowledge of them, to a far greater extent than I do.

Some time during the course of last summer or fall, early fall, it came to our attention-- when I say "our" I mean the Government's attention-- that Hellerman had in fact committed further criminal acts during the summer of 1972, and as a result of that, a period of negotiation between the Government and Hellerman's lawyers ensued.

I am not certain to what extent Hellerman was a party to those negotiations, but I do know that the end result was the written agreement which has been furnished to counsel.

I think that is a substantially complete statement of the arrangement.

MR. EDELBAUM: Your Honor, may I ask your Honor to ask Mr. McGuire if at the time of the first arrangement, when he gave information as to Imperial, as to whether or not there was an agreement at that time that he not be prosecuted in the Belmont case?

I would like an answer to that because I have something in connection with that to state, depending upon the answer.

THE COURT: Would you answer that?

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MR. McGUIRE: It is my understanding, your Honor, and I am operating under some difficulty here because I was not a party to these negotiations, it is my understanding that it was a greed that the pleading to the Imperial case would cover his criminal activities thus far undertaken and that he would not be prosecuted with respect to other matters up to that time.

2:41 pm THE COURT: Including Belmont?

MR. MC GUIRE: Including, so far as I know, Belmont, and there was, in fact -- I am sure counsel are aware of it -- an affidavit filed by Hellerman's lawyers in connection with Belmont in which Mr. Broderick stated in substance that he was informed that the government did not have the intention of proceeding further against Hellerman in the case and for that reason he withdrew his pre-trial motions.

MR. GOLDBERG: I have no awareness of that.

MR. EDELBAUM: Neither do I.

MR. MC GUIRE: That has been stated in open court.

MR. EDELBAUM: I would not quarrel with that, because my memory is not that good.

MR. GOLDBERG: Wasn't there some 1972 crimes that caused an alteration in this agreement? I have crimes that deal with '70 and '71.

MR. MC GUIRE: There have been no indictments with respect to the '72 matters but they are identified in the memorandum of agreement.

MR. EDELBAUM: At the time of the agreement of the government not to prosecute Mr. Hellerman in the Belmont case had an indictment already been presented?

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That is what I would like to know.

MR. MC GUIRE: Yes.

MR. EDELBAUM: Very well, your Honor.

MR. GOLDBERG: May I put on the record, I requested this conference. Or should I wait until the matter of Hellerman is disposed of?

THE COURT: You want to discuss the mortgage?

MR. GOLDBERG: And I want to discuss another matter with regard to Hellerman, and that might be the subject of the same voir dire, if your Honor sees fit.

MR. MC GUIRE: In answer to Mr. Edelbaum's question I responded yes. It may be that I responded too quickly on that. I would prefer to say I do not know the facts as to that.

MR. EDELBAUM: Well, if it is a fact that the government had agreed not to prosecute, then his arraignment with other defendants was a sham and was for the purpose of misleading other defendants and permitting other defendants to be at large with him and talking to him as a common defendant at that time. So I would like to explore that more accurately, if this was done by the government.

MR. MC GUIRE: I can certainly respond to this to this extent. I have talked at some length with Mr. Morvillo, who was the Assistant United States Attorney responsible for

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returning the instant indictment, and I am not confident that he would say if it is the fact that the indictment was returned after a full-fledged bargain had been struck with Hellerman -- and I don't know whether that is the fact or not. But I am sure that Hellerman's treatment at the hands of the government in connection with this case in a variety of ways has been designed for his own protection, rather than for any purpose of defrauding or obtaining information from any defendant. And I can further state that the government has no intention of adducing in evidence any material obtained directly or indirectly by Hellerman at a time when he was cooperating with the government.

MR. GOLDBERG: Your Honor, there is a case, United States against Lusterino, that the Second Circuit dealt with concerning the issue of keeping in the case a person whom the government had no intention of prosecuting. All I can do is alert the Court to the case. I am not sure of the exact language. It is on this general subject.

Do I understand that at the time that Hellerman was named in the indictment, which was in May of 1971, there was no intention to prosecute him?

MR. MC GUIRE: I can't answer that question, but I can say this much, that I do know that at that time Hellerman had furnished some information for the government with respect to the Belmont case. Whether it was before or after that time that an agreement was made between the government and Hellerman's lawyers on this subject I am not prepared to state definitively. I just don't know.

MR. EDELBAUM: Wouldn't it be proper, since Mr. Mc Guire is not certain, to have the individual who has the full knowledge come here and inform your Honor on the record what the facts are so that we can properly protect our position on the record?

MR. MC GUIRE: I would certainly have no objection.

THE COURT: Who is in position to provide us with some of the answers?

MR. MC GUIRE: Mr. Morvillo is the person.

MR. GOLDBERG: May I point out a further problem that I see, and that is that Hellerman conferred with me on a number of occasions and discussed with me the strategy, assisted in my locating witnesses and speaking to people, and I conferred with him at length about what our approach would be in connection with this case, as well as the Imperial case. Now, if at that time he was a "government agent" and reporting back to the prosecutor the nature of my trial preparation, I submit that there may be an invasion of the defendant's Sixth Amendment rights to the effective assistance of counsel.

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THE COURT: When did this take place?

MR. MC GUIRE: There was no time in which Hellerman could be remotely considered a government agent.

MR. GOLDBERG: Informant. Instead of agent, I would say informant. I would like to amend that. It see to me the same vice would arise whether he was an agent or an informant.

THE COURT: What period did this arise in?

MR. GOLDBERG: I spoke to Hellerman during 1971 and tape recorded a lengthy conversation with him in January of '71. I had conversations with him in June and July of '71, September of '71, after the return of the Belmont indictment, which brought me to the point I wanted to touch on in this conference, and that is, I asked Hellerman countless times whether the defendant Dioguardi had been involved in Belmont, and he said to me he had no involvement with Belmont.

Now, the way I suggest this be handled, most respectfully -- this is my request -- is that if Hellerman denies in a voir dire ever having said that to me -- I shouldn't be permitted to even ask anything about it in front of the jury lest my credibility be placed in issue -- but if Hellerman acknowledges saying that to me and then my credibility is not at issue. If Hellerman acknowledges

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having told me that and before the jury, there would be no problem in terms of my credibility being at stake and I woul not press it. If Hellerman denies it, I would be bound b his answer and perhaps a voir dire can be conducted before your Honor.

This practice has precedent before Judge Pierce with respect to Murray Taylor and Fred Goodman, both of whom I tape recorded interviews, and to the extent that they admitted having made statement to me along these lines and I was permitted to ask about them; to the extent that they denied, I was not permitted to go into it on examination.

2/2 pm MR. MC GUIRE: I think to shortcut this problem your Honor, the general response of the witness will be that he admits having had numerous conversations with Mr. Goldberg and he can't remember at this stage just exactly what was said. At least, that is the information that I have gleaned as a result of talking with him.

MR. GOLDBERG: To the extent that he admits numerous conversations, it supports the first portion of my request or argument before your Honor; to the extent that the numerous conversations had between Hellerman and myself after a time when he is an informant for the government invades the defendant's Sixth Amendment rights for effective assistance of counsel, I cite Lusterino.

MR. MC GUIRE: It is also my understanding, again from the witness, his recollection in conversations with me, that those talks with Mr. Goldberg had to do almost exclusively, if not exclusively, with the Imperial situation, and not with Belmont.

MR. GOLDBERG: Might I answer that? That is not true. However, the majority of the conversations dealt with Imperial and not Belmont. However, there were conversations, maybe four or five, in connection with Belmont. Imperial, there might have been nine or ten. But Mr. Mc Guire is correct that the great majority of them dealt with Imperial.

MR. EDELBAUM: I might say, your Honor, that I never directly interviewed Mr. Hellerman. There will be evidence from other witnesses of certain statements Mr. Hellerman made at different times. I particularly cautioned my client not to speak with him, never have anything to do with him after he was indicted. I will put that on the record. I know that my instructions were followed to the letter.

MR. GOLDBERG: I think, your Honor, I should advise you the fact that I conferred with Mr. Hellerman does not come as a surprise to Mr. Mc Guire, because I believe I made disclosure to both Mr. Wing and Mr. Morvillo, and I told Mr. Wing many months ago during the Imperial trial that I had tape recordings of Hellerman, having made them in my office. So I made disclosure to the government of my conversations with Mr. Hellerman. Why if he were an informant the government permitted him to come to my office or to speak to me thereafter, is something that I find objectionable.

MR. MC GUIRE: Let's get one thing perfectly clear. While Mr. Hellerman was a government informant to some extent and to some degree during the period in question, it is going a long way beyond that to say that Mr. Hellerman was under the government's control. He was anything but, as witness the fact that he committed criminal activities during the period when he was a government informant. I might say that this went down rather hard with the government.

THE COURT: I think as a start we ought to invite Mr. Morvillo to come here and give us the benefit of his information.

Will you please ask him to come up?

MR. MC GUIRE: Very well, sir.

MR. EDELBAUM: Shall we recess until he gets here?

THE COURT: Yes, it may take some time.

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(Short recess.)

(Proceedings continued in the robing room with Mr. Morvillo present.)

THE COURT: We have some questions that have been raised, and Mr. Mc Guire is in no position to give us any definitive answer, because he was not in charge of the indictment handed up against Mr. Hellerman in the Belmont Franchising case.

And so perhaps you can give us the benefit of your knowledge and tell us what you know about it.

Would it be helpful if we had the transcript read to you, so that you would know the entire area that has been discussed here, rather than try to fragment it and summarize it?

MR. MORVILLO: If you want to do it by question and answer, fine.

THE COURT: Perhaps we ought to give you the benefit of what has been developed here so that you will be able to pick it up in sequence and see the context in which we have been discussing some of these problems.

(Record read.)

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(Record read.)

THE COURT: Can we leave it at that? Do you get the drift? Do you understand the problems that have been posed here?

MR.MORVILLO: I think I do, your Honor. I think there are really two issues that I can address myself to. As I understand it, and counsel can correct me if I'm wrong, the first is whether or not the indictment of Hellerman in this case was a sham designed to fool defendants or defense counsel or anycombination thereof.

The answer to that is no. What had happened, and I have to give a little bit of background with regard to how this indictment came about, was that shortly prior to the Imperial Indictment Mr. Hellerman came in and after a series of several discussions agreed that he would cooperate with the government and furnish the government information with regard to the Imperial case and with regard to a series of other cases, and with regard to all information in his possession involving organized crime personalities.

In exchange for that the government agreed that if he did that, and that encompassed and envisioned much future cooperation -- it was not only cooperation that could be given in a matter of 30 seconds or in an hour or of two hours of a debriefing, it obviously involved much future cooperation because the cases that Mr. Hellerman specifically discussed with me were cases which the Federal Government really had not had in its possession. At least the United States Attorney's office had not even had referred to it.

At that point there was a case, for instance, involving an organization called "At Your Service Leasing," which did not get referred to our office from the Securities and Exchange Commission for I think at least a year or maybe even longer after Mr. Hellerman began to cooperate.

So, we did make arrangements with Mr. Hellerman whereby he would be able to plead in the Imperial case and that was to cover three or four different cases in which we believed that we could prove, after conducting an investigation, that he had committed a crime. However, since the arrangement was conditional upon his providing cooperation then and in the future, we felt that to protect the interests of the government we had to go ahead and indict Mr. Hellerman on any cases and facts which we had in our possession which indicated that he had committed a crime. Then, at the end of the period of time in which he was to have cooperated with us -- and we envisioned that to be about a year and a half or two mcp3

years -- we would assess whether or not he had lived up to his end of the bargain which was basically two-fold. One was cooperation and two were staying out of trouble, and if he did live up to the bargain at that particular point, then we would have recommended to the Department of Justice that the case be nolle prossed as to Mr. Hellerman.

There was also another problem which we all were mindful of during the course of our dealings with Mr. Hellerman, and that is the fact that he at least according to our intelligence information, information which we had gleaned from the FBI and from the Securities and Exchange Commission and from our own debriefings of Mr. Hellerman that he was in very deep with what we would characterize as the organized crime personalities in the organized crime problem here in New York, and we felt on the basis of all the intelligence information that we had had picked up from a great variety of sources other than Mr. Hellerman in many instances that if it was disclosed, if it became a matter of general knowledge that Mr. Hellerman was cooperating with the government, was providing information to the government, that he would be killed. And it was as simple as that, so that we did take some precautions with regard to preventing people from knowing that he was in fact a government informant or providing the government with information, because he wasn't really technically an informant as far as that goes. We did conceal that as much as we could to protect the security of Mr. Hellerman.

I might say that that is a pattern which we follow in any number of cases, not only in this kind of case but especially in the area of organized crime. Witnesses are extremely hard to come by in organized crime cases and of course they don't get any better if they are killed or if they are threatened, and so we feel that we must protect the integrity and the security of our witnesses.

Now, the second problem as I understand the issues as they developed is whether or not somehow because we concealed the identity of Mr. Hellerman as cooperating with the government we were able to infiltrate the defense camp somehow, and I assume it is a sort of a Sixth Amendment-Massiah type problem that we are discussing here. I anticipated that problem at the inception of my dealings with Mr. Hellerman. I gave him specific instructions with regard to that and the first instruction I gave him was to dissociate himself from any defendants and from any defense counsel.

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Now, it soon became very, very clear to me that he could not do that in any way, shape or form and preserve the image that he wanted to preserve, which was that he was not cooperating with the government, and so it did come to my attention as the investigation progressed and these cases progressed that he was having continual contact with the defendants and with some defense attorneys. When I learned that he was going to do that and would not be able to abide by my instructions with regard to this, I told him basically that as far as I was concerned and as far as any government agent was concerned we did not want him to solicit any information with regard to the defense in any given case, be it pre-indictment, post-indictment or at any stage. We were not interested in learning what the tactics or what the policy or what any of the facts of the defense were going to be. We specifically instructed him not to go and discuss these matters with Mr. Edelbaum, with Mr. Goldberg and with a host of other defense counsel in this case and in the Imperial case. 2

Indeed, I can represent to your Honor that in my dealings with Mr. Hellerman I believe the name of Mr. Edelbaum was mentioned maybe once or twice and it was only in passing, that he did in fact represent Mr. Ostrer and that Mr. Edelbaum was a very fine attorney. The reason

I can specifically recall that is because Mr. Edelbaum came in prior to the Belmont indictment to try to convince me that he had an innocent client, and I take Mr. Edelbaum very seriously when he comes in with matters like that, and I decided to go back and recheck everything that I had done with regard to that case, because he was very sincere, at least I thought he was very sincere, and I still believe that he was very sincere with regard to urging us not to return an indictment in that case. I went back and rechecked with every witness and rechecked as much as I could with respect to the Ostrer situation, whether he should properly be included in that indictment. I went specifically back to Mr. Hellerman and said, "Look, I know Mr. Edelbaum. I know how he operates. He would not come in and urge this position on me unless he really believed it to a certain degree." Indeed, we had gotten so far along the line that Mr. Edelbaum and I at one point discussed whether or not Mr. Ostrer would take a lie detector test. Those negotiations fell down when Mr. Edelbaum didn't want to stipulate the admissibility of a lie detector test, I'm sure for a lot of good legal reasons.

I did go back to Mr. Hallerman, so I do specifically recall just mentioning the name of Mr. Edelbaum on one occasion. At no time did I ever discuss with Mr. Hellerman and so far as I am aware did Mr. Hellerman ever discuss with any government agent, lawyer or other witness, for that matter, what the strategy, what the tactics of the defense would be.

With regard to Mr. Goldberg, we also had several conversations inwhich Mr. Goldberg's name was mentioned. However, to my recollection noneof those conversations ever had anything to do with the Belmont case. We were always concerned about the Imperial case because we didn't know that Mr. Goldberg was going to represent Dioguardi in the Belmont case.

There were one or two occasions when Mr. Hellerman came to me to say that Mr. Goldberg had asked him to go out and get witnesses for him, get potential witnesses, lure them into Mr. Goldberg's office and tape record those conversations with the witnesses.

I said to him that that was basically a problem for Mr. Hellerman and his attorney. I didn't want to have anything to do with that one way or another. That was something he would work out with his attorney, and I specifically told him when he dealt with Mr. Goldberg if he didn't want to go to his attorney he should tell Mr. Goldberg the truth with regard to Mr. Dioguardi's involvement. Mr. Hellerman told me if he told Mr.

Goldberg the truth as to Mr. Dioguardi's involvement Mr. Dioguardi would get very mad with Mr. Hellerman and cause some physical harm to Mr. Hellerman.

He did tell me at one time that he intended not to be truthful with Mr. Goldberg. I simply advised him before he did anything with regard to Mr. Goldberg he should go and tell his attorneys. I certainly didn't want to know anything about Mr. Goldberg's tactics, strategy or anything as to how he was going to present that case.

I can represent to your Honor, again as an officer of the Court, that at no time other than one conversation which I just alluded to or a second conversation which I just alluded to did I ever talk to Mr. Hellerman about the defense strategy, about the defense tactics, about who the defense was going to call as witnesses, who the defense was not going to call as witnesses.

MR. EDELBAUM: May I ask your Honor to ask Mr. Morvillo on the record, because there was a mention on the record which was a little confusing that Hellerman had contacted some defense lawyers or defendants, whether he has any information from Mr. Hellerman that he ever contacted me or I ever contacted him?

THE COURT: Would you respond to that, Mr.

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Morvillo?

MR. MORVILLO: No, your Honor, none whatsoever.

MR. EDELBAUM: Nor my client?

MR. MORVILLO: Nor your client, Mr. Edelbaum.

MR. EDELBAUM: Thank you. I wanted the record to be perfectly clear.

THE COURT: Do you have anything further?

MR. EDELBAUM: No.

THE COURT: Mr. Goldberg.

MR. GOLDBERG: If we accept Mr. Morvillo's word, which I am prepared to do, it does not create any Sixth Amendment problem as far as I can see, and to that extent I'm satisfied.

With respect to the argument that I make on the basis of the Lusterino case, I don't think that Mr. Morvillo has answered that phase of my argument which asserts that the government should not be in a position to put forward as a bona fide defendant someone in an indictment who the government has no intention of prosecuting and I just call to the Court's attention a document that Mr. McGuire alerted me to, namely, an affidavit apparently of Mr. Hellerman's attorney in which that attorney recites some agreement or understandings that Hellerman would not be prosecuted for Belmont and thereby gave up making pretrial motions.

I am curious to find out where the government conceded that when Mr. Broderick made that motion or submitted that affidavit, and if he did so it would seem to lay to rest any question that Hellerman was not a bona fide defendant at the time he was indicted.

MR. MORVILLO: I can respond to that factually. I will leave the legal arguments to Mr. McGuire to make.

Before Mr. Broderick submitted the affidavit in this case he called me to tell me what he intended to do. He didn't want to run up legal fees for his client and make motions with regard to this particular case if the government was not going to proceed to trial, and he was going to submit an affidavit or a letter to the Court saying that the government had informed him that we were not going to prosecute Hellerman.

I told him that we couldn't do that because, I told him, a final decision as to whether or not the government was going to prosecute Hellerman had not been made and would not be made until some future date. I believe I specifically instructed Mr. Broderick at that time to couch his language in that affidavit to say the government at that particular time did not intend to prosecute Mr. Hellerman at that particular time, to leave it open so that the government, after assessing the facts of this case, could see whether or not Mr. Hellerman did indeed fulfill his agreement or would be free to go back to Mr. Broderick and say: "Look, Mr. Broderick, Mr. Hellerman did not perform here in accordance with what he said he was going to do. We want to prosecute this case. Go ahead and reinstate your motions."

Indeed, that is the way it turned out. The fact of the matter is that Mr. Hellerman did not perform in accordance with the representations, if that is the choice of words I can use for Mr. Hellerman, in accordance with the representations that he made to me originally and it was because of that that we sat down with Mr. Broderick and told him we intended to prosecute Mr. Hellerman with regard to this case and other cases.

It was because of that, as I understand it, that Mr. Hellerman came in and pleaded guilty in the case.

MR. GOLDBERG: That was after the indictment was returned. It seems that the indictment was returned at a time when the government had no intention to prosecute him. In other words, only if he faltered in his commitment to the government to behave would there be any intention to indict him. At the time he was indicted the government had no information that he breached any of the government's--it is safe to conclude that at the time the indictment was returned there was anything to indicate the government was going to alter its agreement to him or its commitment to him that he was not going to be prosecuted. Mr. Morvillo himself acknowledges that a good deal of what prompted the indictment of Hellerman was this attempt to plead, whether for the public good or otherwise. I'm not quarreling with it, but to set it up as a device so that other people, whomever they might be, wouldn't get the idea that Hellerman was a government witness and I think that is a kind of excuse that the Court is Lusterino viewed as sufficient. But, once again, I don't mean to mislead you with respect to Lusterino. I just don't have it in my hand. I am giving you just my best recollection of it.

MR. MORVILLO: Let me just add one more thing factually about this case and then I'll shut up and let Mr. McGuire make the argument.

I really have to disagree with Mr. Goldberg when he says that at that time we had made the decision not to prosecute Mr. Hellerman. Mr. Hellerman had to perform certain conditions before he earned the government writing to the Department of Justice in accordance with our normal procedure in requesting that a nolle pross be filed with regard to the Belmont case. That is no different than the average way our office operates on a daily basis with regard to deferred prosecutions. Very often we will indict bring him in and say, "Look, you go out and lead a good life for a year and we'll recommend to the Department of Justice that we throw out this case a year from now." That happens in multi-defendant cases and in single defendant cases and it is not intended to be a fraud on anybody or mislead anybody. It is just that a defendant sometimes has to go out and earn the government going and asking that the Court accept a nolle pros.

MR. EDELBAUM: I accept the fact that Mr. Morvill said he told Mr. Broderick what to put in the affidavit, but from what I understood Mr. McGuire to say I don't know whether that was actually put in the affidavit, so I think I'd like to know what was actually put in the affidavit, whether it was --

MR. MC GUIRE: I have the affidavit. I'm sure Mr. Morvillo's statement is correct.

MR. EDELBAUM: I want to get the record straight.

MR. MC GUIRE: I will get it if there is a question about it. I have it outside.

(Pause.)

MR. MC GUIRE: I misspoke myself. I had it outside and Mr. Goldman has apparently taken it downstairs.

Might I suggest, your Honor, that this is not a series of questions that can or properly should be attacked on the spur of the moment. I'm sure Mr. Goldberg and Mr. Edelbaum are going to want to consider their legal positions in the light of what has been disclosed here today. I am sure they are going to want to review the transcript.

I suppose your Honor too wants time to reflect, and I suppose that I do too.

MR. EDELBAUM: I agree.

MR. MC GUIRE: Couldn't we proceed with the trial?

MR. EDELBAUM: I thought we would have Mr. Hellerman in on the voir dire before we proceeded with the trial.

THE COURT: Are there any further questions you would like to ask Mr. Morvillo?

MR. EDELBAUM: I have none.

MR. GOLDBERG: I have no other questions.

THE COURT: Thank you, Mr. Morvillo.

MR. MORVILLO: Thank you, your Honor.

(Mr. Morvillo left the robing room.)

THE COURT: There are two points to consider befor we call Mr. Hellerman in. One is to inquire of him, Mr. Hellerman, whether he knows Juror Number 3 and to develop any further information which he may have in connection with that knowledge.

The other involves Mr. Goldberg's request that we have a further voir dire of Mr. Hellerman to determine whether he told Mr. Goldberg at any time that Mr. Dioguardi had no involvement and nothing whatsoever to do with Belmont Franchising. Is that correct, Mr. Goldberg?

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MR. GOLDBERG: That is withdrawn in light of Mr. Movillo's statement, which I accept, that Hellerman told him he would not be truthful with me and so you can readily see that he could be damaging to the defense were I to explore it.

The only other thing, your Honor, that I had mentioned is on the mortgage.

THE COURT: Have you had an opportunity to examine these documents?

MR. MC GUIRE: Mr.Goldberg showed me two papers very briefly this afternoon, your Honor. He had a sheaf of papers in his hand and showed me two pages out of the sheaf. I have not had a chance to study them and have not had a chance to consult with the witness about them or show them to the witness. I have not had a chance to examine the full sheaf of papers nor do I know what they are.

MR. GOLDBERG: I have a contract, a deed and a closing statement.

THE COURT: At your first opportunity I suggest you show that to Mr. Mc Guire.

Assuming that Mr. Goldberg's information and his documents would indicate that this payment took place in 1969 --

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THE COURT: -- November 28, 1969, would it be an accepted procedure for you to return to that area of inquiry with Mr. Hellerman and indicate that he had testified that a payment was made on behalf of Mr. Dioguardi concerning a mortgage in November of 1969 and if he indicates that he hasno clear recollection about it, could you then use these documents which we will have marked for identification to refresh his recollection?

MR. GOLDBERG: I don't think that that approach would insulate the defendant Dioguardi from the kind of prejudice that I am concerned with because I certainly could do that on cross examination just as well.

THE COURT: What would you suggest be done?

MR. GOLDBERG: Were you to go into that you would then be able to show that at the time of the Imperial deal in late 1969 when Goldman has talked about the Imperial deal being full fledged action by all co-conspirators, the defendant Dioguardi received $39,000 or $35,000 or the benefit of the $35,000, it would seem to me that knowing that Hellerman got into the Belmont deal in January or February of 1970, the proper question might be whether Hellerman is correct that he paid from the proceeds of the Belmont transaction any moneys for the benefit of Dioguardi or Dioguardi's home in Lake Mahopac.

Having looked at the documents he might very well say "No, I did not. I was not correct when I said that the proceeds of the Belmont case went to pay the mortgage for the Dioguardi home" period.

Your Honor mentioned at the side bar something that I thought was appropriate, that is I would not make hay about it on summation. I would not deal with it on cross examination. If I did, then of course Mr. McGuire couuld come back and show it was in November of 1969, which would be of course terribly prejudicial to me, suggesting that he received the moneys from another deal. But I can assure your Honr that I wouldn't go into it. I think Hellerman, if he looked at the documents, and there is a deed, a contract and closing statement, would recollect that these were moneys paid prior to the Belmont case, so all that he would have to say, having refreshed his recollection perhaps even here in the voir dire, would be to have Mr. Mc Guire say to him: "Mr. Hellerman, you testified that in the proceeds of the Belmont case you made a payment for John Dioguardi's home in Lake Mahopac; is that correct? Do you want to correct that testimony?"

And he would say, I assume, "That is not correct" period.

MR. MC GUIRE: I find this suggestion absolutely extraordinary. Here we have a situation where the documents evidently reveal a prior similar act and a course of conduct.

MR. GOLDBERG: He was acquitted.

MR. MC GUIRE: Whether Dioguardi was acquitted by a jury in the Imperial case or not is of no moment so far as I can see. There are documents which Mr. Goldberg apparently has in his possession which show that his client received the proceeds of other criminal activities and that Hellerman would be prepared to testify to it.

Now, Mr. Hellerman has apparently, if the document are as represented, made a mistake and has testified on the stand that he received -- that he gave proceeds of the Belmont manipulation to Dioguardi for the purpose of purchasing a house when in fact it was the proceeds of another manipulation and Mr. Goldberg is suggesting that I reexamine Hellerman in such a way as to make it appear not that the truth is what occurred but that a half truth is what occurred; that is, that Mr. Dioguardi did not receive proceeds of the Belmont manipulation for purposes of buying his house.

Now, I have stayed away from similar proof in thi case and I might say that it is my present intention not to offer any, but I think I would be well within my rights in offering similar proof with respect to this Imperial situation and I think Mr. Goldberg's suggestion is outlandish.

MR. GOLDBERG: Can I respond to the overstatement and the use of charging words like outlandish or whatever his remarks are in response to my inquiry?

What is the half truth that I seek, or do I not seek a correction of a misstatement of fact made by Mr. Mc Guire's witness? Mr. Mc Guire's witness has said that he paid money for the Mahopac home to Dioguardi out of the proceeds of the Belmont case. Is that true or false? That is false, your Honor.

THE COURT: Let me bring this discussion to a quick end. Mr. Hellerman testified about this payment. On cross examination, if you seek to explore the area of payments and contributions to the Key Chain Company and as to some of the other testimony that he gave in this area concerning the investment of proceeds from Belmont, if you wish to cross examine him and attack his credibility on the basis of this statement you may do so.

MR. GOLDBERG: All right. I choosenot to do so and I want it clear that I am not withdrawing my objection in terms that my claim that the United States Attorney when confronted with these documents has an absolute obligation to correct this misstatement of fact.

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THE COURT: He made no misstatement of fact, as I understand it. This is testimony given by Hellerman based upon his recollection, and if you have documents and if you can shake his testimony and if you can attack his credibility or his memory, by all means do so on cross examination.

MR. GOLDBERG: That would place me un the unenviable position of having to disclose --

THE COURT: Yes, Mr. Goldberg, that may very well be, and I have afforded you a great deal of opportunity by having you raise evidentiary questions which I have attempted to determine in advance because you wanted to save yourself from the dangers and pitfalls which may arise, and I have no reason to fault you about that, but I think I have come to the end of the road on that score. I really do. If you want to cross examine Mr. Hellerman on that score, by all means do. You have a right to attack his credibility, attack his memory in any way that you canappropriate do so.

MR. GOLDBERG: I will not do so lest I get into other acts, unless, of course, your Honor allows me to prove the acquittal of the defendant.

THE COURT: No, I will not. I have already indicated that.

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MR. GOLDBERG: Then I will not do it that way and leave my record as it stands.

THE COURT: Are we ready for Mr. Hellerman?

MR. GOLDBERG: Ready.

THE COURT: While we are waiting, do you have many more witnesses?

MR. MC GUIRE: I will have to consult with my board of strategy, and I won't be able to give an answer to that until after the cross examination of Hellerman is concluded.

(Mr. Hellerman enters robing room.)

THE COURT: Don't you be seated, please.

It has come to my attention that you indicated to Mr.McGuire that you know or that you think that Mr. Wolchock is known to you. Is that correct?

THE WITNESS: I don't know him by name, sir, but one man on the jury looks very, very familiar.

THE COURT: Is that Juror Number 3?

THE WITNESS: The third or fourth man on the jury. I don't know just by talking to you.

THE COURT: Tell us in what context or what you recall or for what reason you think he is familiar to you.

THE WITNESS: I have seen him in restaurants or I have seen him some place and he just looks -- I can't put my finger on it, but the man is very, very familiar to me. I just told that to Mr. McGuire. He just looked very familiar.

THE COURT: Do you also indicate that you think that he knows Mr. Dioguardi?

THE WITNESS: Yes. I don't say that he knows him personally or anything like that, but if he is familiar to me, and I was always in Mr. Dioguardi's company, that it just seems our paths have crossed somewhere.

THE COURT: But you don't recall now whether it is Juror Number 3 or Juror Number 4?

THE WITNESS: I think he is wearing a green jacket today and a tan shirt and he put on his glasses for the last half after we came back from the recess. He put on his black glasses.

THE COURT: Is that 3 or 4?

MR. MC GUIRE: From the physical description that was given to me earlier, I thought it was Juror Number 3, your Honor.

MR. SCHAFFER: Juror Number 4 is Mr. Gmuer, who works at the race track.

THE WITNESS: It's not him. It is a younger fellow.

THE COURT: Is 3 wearing a green jacket?

MR. MC GUIRE: I think he is, your Honor.

MR. EDELBAUM: I wouldn't know if he is wearing a pink jacket, to be honest with you.

MR. GOLDBERG: I haven't noticed the jurors, your Honor.

THE COURT: All right, Mr. Hellerman, you are excused for the moment.

(Mr. Hellerman leaves robing room.)

MR. EDELBAUM: Does your Honor want to hear from me?

THE COURT: Yes, of course.

MR. EDELBAUM: Based on what his statement is, he thinks he looks familiar, a lot of people look familiar to me. I meet a man in the street and say, "I have seen him somewhere. Where have I seen him?"

There must be more than that to make any inquiry here.

THE COURT: I don't know how much more. At the moment I would like to talk to Mr. Wolchock, and then what I think I will do, keeping in mind the dangers that you have raised about pursuing any extended line of inquiry of Mr. Wolchock, after developing the record I think I would excuse him since you have already indicated your consent to that.

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MR. EDELBAUM: I haven't. Mr. Goldberg has. I see no reason for excusing him.

MR. GOLDBERG: May I be heard? I believe that Mr. Hellerman's statement falls far short of the statements made by Mr. McGuire in terms of definite, clear understanding that he is known to the defendant Dioguardi. I think the testimony doesn't support that.

THE COURT: Are you saying that you see no reason for making any inquiry of Mr. Wolchock?

MR. GOLDBERG: I do so. And should you overrule me in that regard --

THE COURT: I do, assuredly.

MR. GOLDBERG: Then I have no hesitancy about consenting to a discharge of the juror rather than placing him back in the jury box. I can't see why, if he is single out on this bare record of Mr. Hellerman's testimony, that he should be placed back in the jury box after being asked specifically about his knowledge of the defendant Dioguardi I think it creates a prejudicial atmosphere for the defendant Dioguardi.

I would consent, in the interest of moving the case along, to his discharge.

MR. EDELBAUM: I will give you the reason why I am not going to consent. We started out with six, and this trial, the way it's going, could last longer than we anticipated, and I don't want to put all this work in this case and have to try it over again.

Your Honor, I see absolutely no basis, from what Mr. Hellerman stated here, for any inquiry of the juror whatsoever based on him. He gives no reason why he knows him, just he thinks he knows him, he has seen him around somewhere. A lot of people are around.

MR. GOLDBERG: He gave a feeling, your Honor.

MR. EDELBAUM: A feeling, that's all he gave.

THE COURT: What do you say?

MR. MC GUIRE: Your Honor, I think that it certainly deserves an inquiry into what the circumstances of this juror's acquaintance with two, or possible acquaintance with two, of the principals in the case might be.

THE COURT: Speaking for myself where I sit, I see no possible way of easing my own mind about Juror Number 3 without at least some inquiries which I would hope would be delegated in the first instance. I can't possibly sit back and continue this trial with the possible fear or danger that this juror may be tainted.

MR. EDELBAUM: Then I would say in the interest of creating the least prejudice that he only be -- that inquiry be made of whether he knows Hellerman, because the only reason Hellerman says he might know Dioguardi is because Dioguardi has always been with him. If the juror says he has never seen or knows the witness, I think that wo terminate it. But there would be considerable prejudice if it is pointed does he know Mr. Dioguardi after he has already been asked on Voir Dire by your Honor and he has denied it under oath.

MR. GOLDBERG: May I say something?

THE COURT: Yes.

MR. GOLDBERG: I think I want to join in what Mr. Edelbaum has said. Mr. Edelbaum has said or Mr. Hellerman has said to your Honor, "The only reason I think he might know Dioguardi is because I know him, I have seen him around, and I am always with and have always beenwith the defendant Dioguardi."

So why couldn't it be accomplished in the way Mr. Edelbaum suggests?

THE COURT: That wouldn't satisfy me.

MR. GOLDBERG: Your Honor, I hope my position is clear. If your Honor is the least --

THE COURT: Your position is clear. You put it on the record and I will make my ruling and you make what you will of it.

MR. GOLDBERG: I prefer if there is any bit of concern that your Honor or Mr. McGuire has about this, I would prefer that we move the case along with another juror. We have four --

THE COURT: I would prefer to follow your suggestion in that regard, but Mr. Edelbaum won't consent.

MR. EDELBAUM: No, I won't, your Honor, and I am not being stubborn. I am tryong to protect a client. We had a careful selection of the jury and the exercise of our peremptories. That is a very cherished right of a defendant. I exercised them the way I thought I should, and in the absence of any evidence, not just feelings on the part of this witness, we can't discharge him.

I submit to your Honor any inquiry further than the fact whether he knows Mr. Hellerman in view of Hellerman's statement would be prejudicial to the defendants.

THE COURT: Have Mr. Wolchock in and you can have your objection subsequently.

MR. MC GUIRE: Your Honor, the question arises as to whether this inquiry ought properly be conducted in the first instance by your Honor alone or in the presence of counsel.

THE COURT: What?

MR. MC GUIRE: The question arises as to whether this inquiry of the juror ought in the first instance to be conducted by your Honor alone or in the presence of counsel. I know that similar inquiries during the course of trials in this courthouse have beenhandled in both ways in the past, and I suggest that since your Honor has mentioned a delicate inquiry in the first instance, that your Honor might want to consider an inquiry in chambers since perhaps jurors are more inclined to be frank and not intimidated under those circumstances. I do not necessarily recommend that suggestion, but I thought it was a possibility that should be thrown open.

THE COURT: I have followed both courses depending on the situation brought to my attention in connection with any juror, but I think in the circumstances here, in view of the various objections that have been raised based upon questions that they anticipate might engender, some prejudice, that perhaps we ought to do that in the presence of all counsel, unless they have some different thoughts.

MR. GOLDBERG: I have no objection.

MR. EDELBAUM: No objection to what?

MR. GOLDBERG: To doing it in the presence of counsel.

MR. EDELBAUM: I have none either.

THE COURT: You then think this is the preferred method?

MR. EDELBAUM: Yes, your Honor.

THE COURT: Very well. Bring Mr. Wolchock in.

Before I even begin to inquire of him, let's take a close look at his appearance and see if he in any way coincides with the description given by Mr. Hellerman.

MR. GOLDBERG: When I say the preferred way, I mean reserving my objection heretofore made.

THE COURT: Your objections are reserved.

(Mr. Wolchock enters robing room.)

THE COURT: Mr. Wolchock, please relax and, to use the words we all understand, don't be up tight. I am going to put you under oath and ask you a few brief questions which I am confident you will answer responsively.

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STANLEY WOLCHOCK, BEING first duly sworn, was examined, and answered as follows:

BY THE COURT:

Q You know that there is a witness on the stand at the moment?

A Yes, sir.

Q And you know that his name is Mr. Michael Hellerman?

A Would you speak a little louder, your Honor?

Q You know his name is Michael Hellerman, do you not?

A Yes.

Q Have you ever seen him before?

A I have not.

Q Do you know him in any possible way?

A No, sir.

Q Have you ever seen anybody else in this courtroom who is in this trial, any of the defendants or any of the lawyers or me or anybody else?

A Not to my knowledge, no.

Q In other words, it is your firm statement that you have never seen me or the lawyers who are all here, government lawyers, defense lawyers and my law clerks --

A No.

Q -- my deputy clerk or me?

A Nobody.

Q Nobody?

A No.

Q There is nobody in this court that is familiar to you?

A No, as far as I know, no.

THE COURT: All right, just stand outside for a few moments.

(Mr. Wolchock leaves robing room.)

MR. EDELBAUM: I am quite satisfied with the questions your Honor asked and I would respectfully suggest that the juror be advised that he not discuss this with the rest of the jurors in the jury room.

MR. MC GUIRE: Mr. Goldberg suggested if an inquiry of this kind be conducted he would prefer that once it has been conducted the juror be excused.

I suppose before commenting on the situation I would like to hear what Mr. Goldberg's position is because it will certainly affect mine.

MR. GOLDBERG: My position is firm. I believe that it should not have beenconducted and I adhere to my previously recited opinion.

MR. MC GUIRE: We would consent to the excusing of this juror under those circumstances, your Honor.

MR. EDELBAUM: There is only one unfortunate obstacle to that consent. I have clearly stated that I do not consent.

MR. MC GUIRE: I would respectfully suggest, your Honor, that it is a matter for the Court's discretion.

THE COURT: Before exercising my discretion, I am turning over in my mind what basis do I have for disqualifying this juror based on his answers, unless you feel further inquiry is necessary.

MR. MC GUIRE: Your Honor, I was going to suggest, if Mr. Goldberg changed his position, that a further inquiry as to the way the juror conducts his life and what restaurants he frequented during 1970 and the like be made. If Mr. Goldberg thinks now that the juror should be excused without more, I am prepared to go along with that. I am frank to say that when the witness Hellerman was eager to tell me that he was sure he had seen this man before, that in itself was enough for me because I think the possibility of prejudicing a jury by any conceivable acquaintance with one of the principals in the case is sufficient in and of itself and that justice is served by exercising great caution in that regard.

Now that I hear that Mr. Goldberg's positionis that the juror ought to be excused, I must say I endorse that position and would urge your Honor to exercise his discretion in that regard.

MR. GOLDBERG: I don't take, most respectfully, kindly to the joining in my position, because I find that, based on the statements made by Hellerman, there was no need for this overstated application of Mr. McGuire. For him to first ask me what I am going to do when your Honor or Mr. Edelbaum, through your Honor, asked Mr. McGuire what he wanted to do offends me. I shouldn't have been asked for my position first by Mr. McGuire through your Honor. I think the whole proceeding was unnecessary because I think Hellerman's --

THE COURT: I don't think it's unnecessary.

MR. EDELBAUM: Your Honor, discussing that --

MR. GOLDBERG: Of course I respect your Honor's wishes and I don't mean to be critical. I am just voicing my opinion.

MR. EDELBAUM: Let me give you my reasons definitely why I object to your Honor exercising any discretion which, most respectfully on the record, I don't believe you have. You have absolutely no basis at all.

Let me tell you why. Alternate Juror Number 1 is a juror which I had to take because two of my challenges were only allowed to me under the law for the six alternates had already been exercised. Juror Number 3 is a juror which was accepted by me while I still had challenges. So I submit to your Honor that that's the juror that I am entitled to have unless there is a clear basis for your excusing him. And in the event your Honor does excuse him, I will have to protect the record in a manner that I think is proper.

MR. MC GUIRE: Might I state for the record here that Alternate Number 1 has already assumed a place on the jury. That's Mrs. Overby.

MR. EDELBAUM: Who is now Alternate Juror Number 1. It is Alternate Juror Number 2. You know what I am talking about.

MR. MC GUIRE: Alternate Juror Number 2 was one of the original alternates that was picked in the box. There was nobody that replaced her as a result of a challenge.

THE COURT: Will you please bring Mr. Wolchock back for a few moments.

(Mr. Wolchock returned to robing room.)

THE COURT: Just a few more questions, Mr. Wolchock.

BY THE COURT:

Q Do you have occasion to frequent restaurants here in New York?

A In New York, no. I am in Long Island City.

Q Have you ever gone to any restaurants in New York?

A A number of times I have.

Q Are these places that you go to with any degree of frequency?

A No.

Q Can you remember some of the restaurants that you have gone to in New York?

A The last time in New York was on 86th Street called Aldo's, and the one across the street from there, a Hungarian restaurant, the time before that. That was in

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the last four or five months that I have been to New York in a restaurant.

Q Is that with your wife?

A My wife and friends, yes.

Q This is in '72, is that right?

A '72, yes.

Q What about '71?

A I may have been in a restaurant a number of times in '71.

Q Can you remember them at all?

A One Sunday at Pier 52, a seafood place, Oscar's seafood place on Third Avenue and 67th Street in New York. Let me think what else. That's about the extent. We don't hit the city too much.

Q On how many occasions, as far as you can recall, have you gone to Pier 52?

A Once.

Q Was this alone or in the company of somebody else?

A In the company of friends.

Q Many friends?

A Yes, we were four couples.

t5/1 pm

Q Can you remember when that was?

A I know it was a Sunday. We were going to a movie. Truthfully, I couldn't say when it was, what part of the year. I could say it was summertime, we didn't have coats at that time, it had to be.

Q How did you come to Pier 52?

A How did I come --

Q How did you come to pick Pier 52?

A We picked on some 50 odd street and we were passing by and we discussed it ourselves and we decided to eat over there.

Q Can you tell us who your friends were?

A Yes, they are relatives of mine. Where I live in Spring Valley, we have five first cousins who live on the same block, and that is who we socialize with.

Q Do you know anybody at Pier 52? The waiter? The bartender? Or anybody else?

A No.

Q This was in the evening?

A In the afternoon, I would say about three o'clock, three or four o'clock.

Q Any other restaurants you can think of in '70? '71?

A [illegible]

Q Pardon?

A Offhand, no. I mentioned the two I mentioned, the latter part of last year, and that is about the extent of it, and the one I just told you now.

THE COURT: Please wait outside.

(Juror No. 3 leaves the robing room.)

MR. GOLDBERG: Your Honor, can I point out something to you that might have escaped us all? The defendant Dioguardi has been incarcerated since November 1970. So he was not on the street at Pier 52 or anywhere else in 1971.

THE COURT: But Mr. Hellerman was.

MR. GOLDBERG: Well, I will run the risk that he may know Hellerman. I don't know that.

THE COURT: Well, if he knows Hellerman that would be a reason for in my estimation disqualifying him, or if he had ever seen him.

MR. EDELBAUM: Where is the evidence of that?

THE COURT: There is no evidence of it, but he was at Pier 52, it was warm weather, he testified to the fact that he did not have a coat, and I will take judicial notice of the fact that spring can be warm and it would not be necessary to wear a coat. I don't see any reason for going into it in any greater depth. Pier 52 is not a well-known restaurant.

This restaurant has been mentioned by Mr. Hellerman as a restaurant in which he was present, and this man says he was at Pier 52. I think there is sufficient indication for me to excuse him.

MR. EDELBAUM: Your Honor, I would suggest that Pier 52 is a well-known restaurant, and I would suggest to you that you take a poll right here of your law clerks about hat.

THE COURT: Be that as it may, the fact is that this restaurant was mentioned by Hellerman. He stated he thought the juror was familiar to him and that this juror was present at Pier 52. Although this is hardly the kind of positive evidence that I think should be altogether conclusive, it is at least enough to suggest some wariness and caution on my part.

MR. EDELBAUM: Your Honor, I respectfully move for the withdrawal of a juror and the declaration of a mistrial in view of your Honor's ruling.

THE COURT: Your motion is denied.

MR. EDELBAUM: I respectfully except.

THE COURT: Call Mr. Wolchok back.

(Mr. Wolchok makes his appearance in the robing room.)

THE COURT: Mr. Wolchok, I am going to excuse you, but I want you to have no feeling that any mean or unpleasant thoughts are being held about you, or that we don't think that you are anything but a fine and upstanding man. Some problem question has been raised, and I think in the interest of my discretion I am going to excuse you. I hope you don't feel too badly.

JUROR NO. 3: I won't.

THE COURT: But I am not disqualifying you from jury duty, nor am I striking your name in any way.

JUROR NO. 3: Right. Thank you.

THE COURT: Thank you very much.

(Juror No. 3 excused and leaves the robing room.)

MR. SCHAFFER: Before the juror leaves, may he be reminded to say nothing to the other jurors?

THE COURT: All right, Please do that quickly.

(Juror No. 3 returns to the robing room.)

THE COURT: Mr. Wolchok, I hope you will not mention anything of this to any of the jurors. Just excuse yourself. Will you do that?

JUROR NO. 3: Pardon me?

THE COURT: Just excuse yourself and say you have to leave.

JUROR NO. 3: Right. Will do. Thank you very much.

(Juror No. 3 excused.)

THE COURT: Is there anything else, gentlemen, before we proceed?

MR. EDELBAUM: I have nothing.

MR. MC GUIRE: Nothing further, your Honor.

:5/2 pm (In open court, jury present.)

MICHAEL C. HELLERMAN, resumed.

THE COURT: Ladies and gentlemen, please forgive this delay in resuming our trial. I assure you we were not on an extended lunch period. We have had some problems to resolve. As I instructed you earlier, you are the exclusive judges of the facts and the Court is charged with administering the law. Occasionally legal problems do arise which require discussion and conference and decision. Unfortunately, we do not possess infinite intelligence, and occasionally we find that we have to consume some time in reaching a decision.

Juror No. 3 has been excused, and now alternate Juror No. 2 will take the place of Juror No. 3.

(Hannah T. Bradley took her place in the jury box as Juror No. 3.)

THE COURT: Are you ready to proceed, Mr. Mc Guire?

MR. MC GUIRE: Yes.

DIRECT EXAMINATION CONTINUED

BY MR. MC GUIRE:

Q Mr. Hellerman, prior to our breaking for lunch you were telling us about events that occurred during, I believe you said, April of 1970.

Am I correct, sir?

A Yes, sir.

Q Now, by April of 1970 had you received all of the front money that was coming to you in connection with the Belmont deal?

A Yes, sir.

Q Had you testified previously as to all of the moneys that you received in that connection?

A To the best of my recollection, yes, sir.

Q Can you tell us in what form you received your front money?

A Both cash and checks.

Q Wouldyou go over, please, the occasions on which you received cash? Just very briefly.

MR. GOLDBERG: I object. It has been asked and answered.

THE COURT: Haven't you inquired as to that?

MR. MC GUIRE: I have, your Honor. Perhaps I can refresh the witness' recollection with one document.

MR. GOLDBERG: The witness has not said his recollection needs be refreshed. He has answered. That is my objection, not in terms of foundation.

THE COURT: You have not exhausted his recollection?

MR. MC GUIRE: Very well.

Q Mr. Hellerman, did you receive your front money in the form of checks or cash?

A Both.

Q How many checks did you receive?

A I believe four.

Q Now, perhaps I am wrong, but I think the record will reflect that you have testified as to the receipt of only three checks.

A Correct so far.

Q Did you receive a fourth check?

A Yes, I did.

Q From whom did you receive that fourth check?

A Mr. Soldano.

Q Do you remember when you received that fourth check?

A March of '70.

Q Do you remember where you got that check?

A In the coffee shop. He gave me all the checks in the coffee shop.

Q Do you remember what you did with the check when you received it?

A Yes.

Q Do you remember the amount of the check?

A 26,000 and change.

Q I show you Government's Exhibit 88. Can you identify that, sir?

A Yes, sir.

Q What is it?

A This is the last check that I received.

THE COURT: Keep your voice up, Mr. Hellerman. Please keep your voice up.

MR. MC GUIRE: We offer Exhibit 88.

MR. GOLDBERG: I object. I don't want to see it.

THE COURT: You mean you object just as a matter of course?

MR. GOLDBERG: You described what the document was, your Honor, and on the basis of that description I make my objection.

THE COURT: Overruled.

MR. EDLEBAUM: May I see it? May I just inquire on the voir dire.

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. EDELBAUM:

Q Do you know the person to whom this check is made payable to?

A Yes, sir.

Q Was the writing on the back of the check when you received it, as you say, from Mr. Soldano?

A Was the writing on the check when I received it from him? Yes.

Q Are you familiar with the handwriting?

A No, sir.

MR. EDELBAUM: I have no objection, your Honor.

xx (Government's Exhibit 88 was received in evidence.)

MR. MC GUIRE: Ladies and gentlemen, Exhibit 88 is a check dated March 31, 1970, drawn on the account of Lincoln Securities at the Hempstead Bank in the amount of $26,408.50. It is drawn to the order of Marilyn B. Goodman. It is signed Richard Greenberg.

On the reverse is the handwriting, the handwritten endorsement, Marilyn B. Goodman.

Beneath that is a rubber stamped endorsement For Deposit Trust Account of Pollak & Patras.

Beneath that is a further endorsement: Pay Any

Bank, Banker or Trust Company, the National State Bank, Elizabeth, New Jersey.

And the check is marked Paid at the Hempstead Bank on April 6, 1970.

BY MR. MC GUIRE:

Q Now, you said you remembered receiving this check from Mr. Soldano in the coffee shop?

A Yes, sir.

Q What did you do with it after that?

A I gave it to Mr. Patras.

Q Did you give Mr. Patras instructions at the time you gave the check to him?

A Yes.

Q Can you tell us whether you had any conversation with anyone else besides Mr. Patras on the subject of that check?

A Johnny, we -- Johnny and I. I made this investment in a key chain company and Mr. Sedev needed more money and I told Johnny I was getting this last check and I would give it to Sockey so he would have the money.

Q Who is Sockey?

A Mr. Patras -- he would have the money that was needed, and $9,000 of that check went into Hargo Creations or Seymous Sedev's business, and the other 17,000 and change went into the Boy Friend, the show that Louie and t5/3

I produced on Broadway.

Q Now, sir, I believe you testified this morning that during the course of April the price of the stock went upwards of $30 per share?

A Yes, sir.

Q Had you previously had any discussions with anybody as to what would happen when the stock reached that price?

A Yes.

Q With whom?

A With Soldano, with Louie -- with Mr. Ostrer -- with Kruger, with people that bought the stock.

Q Now, let's concentrate on the discussion you had with Mr. Ostrer on that subject. When did you have that discussion?

A At the very beginning when Mr. Ostrer came to my house, when we first started talking about Belmont and the insurance policy.

Q Can you tell us what discussion you had with Mr. Ostrer on the subject of what would happen when the stock reached that price?

A Well, Louie wanted to know what happens, how we are going to get rid of the stock when the stock goes to 30 or 40, whatever the price the stock would go to, and I explained to Louie that I pay other brokers under the table to retail the stock. If the stock hypothetically goes to $40 and I want to sell 10,000 shares, I might offer a broker $5 a share or $10 a share to place that into his customers' accounts, and that is the way we get out of the stock, and Louie said he knew, he understood what I was telling him, what I was telling him was fact, and that is the way it was done, and we, a little later on, not at the same time --

Q Did you have another discussion with Mr. Ostrer? Is that what you are trying to tell us?

A Yes.

Q What was that other discussion?

A At one of the meetings that Johnny, Hickey, Louie and I were at, I was going to try to start selling the stock.

Q You told him that?

A Yes.

Q What was the response of Mr. Ostrer to that?

A He was happy that we were starting to get out of the stock, and Johnny wanted me to make sure -- I told him I don't know how much I am going to have to pay, $5 a share, $3 a share, or $10 a share, but Johnny wanted to be sure before I sold a share of the stock, before I did anything, I informed Louie what it was going to cost so nobody could say I was taking more for myself than what I was paying out.

Q Was this all said at this meeting that you are speaking about between the four of you?

A No, this is a different time.

Q Now, let's get it straight, Mr. Hellerman, is this a conversation that you had with Mr. Dioguardi alone?

A No, no, the four of us were there. This was not a meeting at Pier 52.

Q Are you telling us that you had another meeting with the four of you?

A This was in Johnny's office.

Q And the discussion that you are relating occurred in the presence of Mr. Ostrer, Mr. Dioguardi, and Mr. Hickey Di Lorenzo?

A And myself.

Q Tell us what the discussion was?

A That I was getting ready to try to retail the stock and I didn't know how much I would have to pay to have it done, $5, $8, $10, I just didn't know, and Johnny said, "Before you do anything or sell any stock you make sure you tell Louie how much it is going to cost, because I don't want them to say that it was $5 and you charged them $10," meaning that I was making money. Hickey and Louie had to okay any contract that I made with any outside broker or [illegible] anything, and when that was said, Hickey said, "That is not necessary."

He said, "All you have to do is tell Johnny. Johnny, if he tells you, that is good enough for me."

Q Now, Mr. Hellerman, did you, in fact, have occasion to make any such payments as you have described under the table to brokers?

A No.

Q You did not?

A No.

Q After the market in Belmont stock reached a quoted price of $35 a share was there an event that happened?

A Yes.

Q What was that event?

A Well, I saw that I didn't have the brokers and that I could pay to retail the stock and I wanted to get out of the stock, in other words, sell the 27 or 28,000 shares, and so I tried to put together a bust-out scheme to sell the stock to member firms or to an over-the-counter firm that had a good contractor, and that all my customers that bought the stock and the stock that Louie had left and the stock that Soldano had left, that we could sell out and get the money before the other brokerage houses would pay for the stock.

Q Was there something that triggered this plan for a bust-out scheme?

A Well, when I saw that nothing was coming, that I couldn't retail the stock, and I owed Mr. Ostrer a hundred thousand dollars, or a net of 70 -- 60 I had gotten back -- the investment was approximately $160,000 and I told Hickey, I said that if there are no profits there can't be any losses.

Q No, I think you better answer my question, Mr. Hellerman. Was there something that triggered this bust-out scheme in your mind?

A Yes.

Q What event was it that triggered the bust-out scheme?

A The money that I had to pay back Mr. Ostrer.

Q Did there come a time when stock appeared on the market that you didn't know about, Mr. Hellerman?

A Yes.

Q Can you tell us what happened and how you learned about it? pm

A I was supporting the market and I was keeping the price of the stock around 40, $45, $50, somewhere in that range, and all of a sudden New York Hanseatic, a large brokerage house, started to sell a lot of the stock.

Now, I had all of the stock. By me having all the stock, my customers and the people that owned the stock who I sold, my customers had all the stock, now, where could the stock be coming from if we owned every share.

Q Did you do something when you discovered this stock was appearing on the market?

A Right. I checked out who the stock was coming from.

Q Whom did you check with?

A I checked first with Soldano and Freddie Goodman, because --

Q Don't give us your reasons. Just tell us what you did.

A Soldano and Goodman.

Q Did you check with anybody else?

A I checked with Louie if he was selling any of his stock, and he said he wasn't, and I checked with all the other customers.

pm Q Did you tell Mr. Ostrer what had happened?

A Yes.

Q Did you tell Mr. Dioguardi what had happened?

A Yes.

Q Did you subsequently discover where the stock had come from? Just answer that yes or no.

A From whom did you discover it?

A The president of the company.

Q From whom did you discover it, sir?

A From Freddy Goodman or Soldano; I don't remember which one.

THE COURT: (To the spectators) Please, no conversation in the rear of the courtroom.

Q Now, after this stock began to appear on the market, did the market in Belmont Franchising stock continue?

A No.

Q Did there continue to be active trading in the market?

A When it first appeared?

Q Yes.

A Yes.

Q For how long a period of time?

A Until I found out that I couldn't pull a bust-out and I couldn't do anything else to save the deal and I just walked away from it.

Q Now, you talked about what you have called a bust-out scheme. Can you tell us, Mr. Hellerman, what a bust-out scheme is?

A That is where you have one broker or three or four brokers buying the stock, and your customers or yourself selling the stock on the other side. You get what is called a contract, a stock contract. When the stock is delivered in seven days -- you deliver the stock -- you get paid and receive the check, and the brokerage house that made the contract on the other side --

Q The brokerage house that has made the purchase?

A -- he would pay the brokerage house you bought the stock from, and you are supposed to pay him the same day, and the Stock Exchange rules is they always give you two or three days extension, so you could theoretically get paid on your side and never pay the brokerage firm on the other side.

Q Is that the scheme you had in mind?

A Yes.

Q Did you discuss that scheme with either of the defendants on trial here?

A Yes.

Q With whom?

A Both.

Q Do you remember how many times?

A There was one main discussion.

Q And who was present at that discussion?

A Johnny and Hickey and I.

Q Where did it take place?

A Johnny's office.

Q Do you remember what was said?

A Well, Hickey was putting the pressure on me --

MR. GOLDBERG: I move to strike it, your Honor.

THE COURT: Strike it.

Q Let us just get it very cleasr, who was present at this discussion.

A Hickey, Johnny and I.

Q Not Mr. Ostrer?

A No. And I owed Louie this money for the stock and nothing was happening with the stock and Hickey wanted me to pay Louie the money.

Q That is what he told you?

A Yes.

Q By this time had the market collapsed?

A No, it had not collapsed at that point but there was nothing happening. I came with the proposition that I was going to do a bust-out, and Hickey told me not to do it. He told me that there was going to be a lot of trouble in the stock, there was going to be indictments in the stock, and that he couldn't do anything to help me in the Southern District but that if I let it take its course that I should not make-- add on to what had already happened and he advised me against trying to do the bust-out.

Q What did Mr. Dioguardi say?

A He just listened. He didn't make a comment either way.

Q Did you discuss the proposed bust-out on the one occasion or more than one with Mr. Dioguardi?

A With Johnny a couple of times.

Q Did there come a time when the market for Belmont Franchising Corporation stock collapsed completely?

A Yes, sir.

Q ANd can you tell us approximately what time of year that was, to the best of your recollection?

A June, 1970.

Q And at that time when there was no more trading in the stock, did you have any further discussion with either Mr. Ostrer or Mr. Dioguardi?

A Yes.

Q With one of them or both of them?

A Both of them.

Q Together or separately?

A At this point, mostly separately.

Q Will you tell us about the first discussion that you had with either one of them?

A Mr. McGuire, I can't answer the question in the way you have put it to me, in other words --

Q You can't remember which came first?

A No, because there was a series of them and I can't answer it that way.

Q Can you distinguish one conversation from the other in your mind?

A No.

Q Let's just concentrate, then, for the moment, on Mr.. Dioguardi.

Can you tell us in substance during the course of these discussions that you had with him what you told him or what you said to him and what he said to you?

A Johnny and I -- I was responsible---

Q Please, not your conclusions, Mr. Hellerman. You had trouble with that before. Tell us what you said and what he said.

A I was responsible for a net of $70,000 that I owed Louie on the guarantee at this point.

Q That is what you told Mr. Dioguardi?

A Right. Johnny knew it. Hickey was coming up to Johnny's office every day and he was hounding Johnny to get the money from me. And every day I would tell Johnny, "I am trying to get the money here, I am trying to get the money there, I will try to work something out, maybe I will revise the deal."

I was desperate trying to get the money to pay the $70,000 because Hickey was putting a lot of pressure on.

MR. EDELBAUM: I move to strike that out.

THE COURT: Strike it.

Q Is that what you told Mr. Dioguardi or in fact was your own mental process?

A That is what happened with Johnny and I.

Q Please, Mr. Hellerman, listen to the question. I want you to answer what you told Mr. Dioguardi, what you said to him, what he said to you. We do not want your mental processes during the course of these discussions.

Is that pretty clear?

A Yes. This is what happened, Mr. McGuire. This is what was going on.

Q Just take your time and try to recount to us what you said to Mr. Dioguardi and what Mr. Dioguardi said to you. That's all we want to hear.

A Johnny wanted to know when the money was going to be paid, he was trying to put Hickey off, Hickey was up there bothering him"When is Mike going to pay the money, when is Mike going to pay the money?"

MR. GOLDBERG: I move to strike the answer.

THE COURT: I will allow it.

A Johnny was taking the brunt of Hickey, because he was up to his office every day.

Q Were you there when Hickey came up to Johnny's office?

A Many times.

Q You said you had some discussions with the defendant Ostrer during this period of time, too?

A Yes.

Q Can you distinguish one of those discussions from the next?

A One I can distinguish clearly.

Q Tell us about that. When did it occur and where?

A Sometime in the middle of 1970, and Murray Winters and I were in Louie's office and another --

Q Where was Louie's office, by the way?

A 35th Street and Fifth Avenue. Another friend of ours, Rudy, came in and Louie owed Rudy some money and Hickey -- Louie couldn't pay Rudy this money, so Hickey was in the office and Hickey turned to me and he said, "Tell Rudy how much money you owe Louie, because you are making it hard for everybody, because Louie can't pay what he owes because you owe Louie the money."

So I had to tell Rudy how much I owed Rudy so it would be confirmed that I owed Louie this money.

Q Did you have any discussion with Goodman or Soldano?

A With Soldano.

Q Was that a loan between Soldano and you or was there someone else present?

A No, Soldano and I.

Q Can you distinguish one of these discussions wi
Soldano from the next?

A Soldano claimed that I owed him $15,000.

Q Yes?

A And I claimed I didn't. I claimed he had invested $30,000 or $31,000 and he got $31,000 back when he sold 1100 shares of stock and that I didn't owe him $15,000, that he couldn't expect a price of $15 when he only paid -- his out of pocket cost was 10. I said, "If you have a beef go see Johnny. I don't pay you the $15,000 because I don't owe it to you."

Q Do you know whether he went to see Johnny?

A I know he went to see Johnny.

Q Were you present at that time?

A No.

Q How do you know?

A Because he told me.

Q Who?

A Tony.

Q Tony told you that he had gone to see Johnny.

Did you have occasion to make good on any of these claims that were being asserted against you by these various individuals, Mr. Ostrer, Mr. DiLorenzo, Mr. Soldano and the rest?

A I paid -- yes.

Q To what extent? Did you pay all of their claims?

A No.

Q Did you pay part of their claims?

A Yes.

Q Whose claim did you pay in part?

A Louie's, Mr. Ostrer.

Q How much didyou pay?

A $25,000.

Q When?

A I shouldn't say -- I didn't actually pay the physical money.

Q Yes? What did you do?

A Money was owed to me and Johnny went and picked up the money for me.

Q Did he tell you that or do you know that of your own knewledge?

A I was in his office when he left to pick up the money.

Q And he told you where he was going?

A No. He told me what he was going to do. I don't know where he went. And then he said that he gave $25,000 of the money to Louie Ostrer.

MR. MC GUIRE: May we have just a second?

THE COURT: Will you please refrain from conversation in this courtroom or I will have you ejected.

I don't want a single sound in this courtroom.

(Pause)

Q Mr. Hellerman, during the course of various discussions that you have testified occurred in Mr. Dioguardi's office, do you remember others ever being present?

A Would you please repeat the question?

MR. MC GUIRE: Mr. Reporter.

Your Honor, may the reporter repeat the question?

THE COURT: He may.

(Question read)

A Yes.

Q Can you tell us who else was present at one or more of these discussions in Mr. Dioguardi's office about Belmont's Franchising stock?

A Mr. Schoengold, Mr. Kelsey, I believe one time Mr. Winters.

MR. MC GUIRE: No further questions.

MR. GOLDBERG: Your Honor, I didn't hear the last. Might I ask --

THE COURT: Mr. Reporter, would you please repeat the question and answer.

(Record read)

MR. MC GUIRE: Pardon me, your Honor. I forgot something I planned to ask.

BY MR. MC GUIRE:

Q Mr. Hellerman, you told us at the very beginning of your testimony yesterday that you had been indicted a number of times in this very court.

A Yes, sir.

Q And I believe you told us that you had pleaded guilty in a number of cases, including this case, is that correct, sir?

A Yes.

Q Now, have you had occasion during that five years to commit other acts which you knew to be criminal besides those three cases?

A Yes, I have, sir.

Q Approximately how many?

A Eight, ten cases, 12 cases. I don't know.

Q Many other crimes?

A Yes.

MR. MC GUIRE: I have no further questions.

MR. EDELBAUM: May we have a side bar?

(At the side bar)

MR. EDELBAUM: I had inquired earlier from Mr. McGuire, yesterday and this morning, if he had any other 3500 mate_ial, and he said that he had some notes of his which he would only give us at the end of the direct testimony. I would now ask for that production and an opportunity to peruse them befoer we commence any cross-examination.

MR. MC GUIRE: I am happy to furnishthe material, your Honor. It is very brief. It consists only of my handwritten notes of interviews in connection with this witness. I would suggest that Mr. Edelbaum will have plenty of opportunity to peruse those before he ever begins his cross-examination.

THE COURT: Are you ready to proceed?

MR. GOLDBERG: How long would your Honor intend --

THE COURT: 5:30.

MR. EDELBAUM: That presents this problem. I don't get my record.

THE COURT: I know it presents a problem. It presents a problem to all of us. We are far behind in time and we have to pick up the pace.

MR. EDELBAUM: I know, your Honor. Unfortunately I have ordered this record and have it delivered to my home. Last night I didn't get the complete record. I anticipate in preparation for cross-examination in getting the record I would need at least four hours this evening. To work to 5:30 now and then to continue on is a physical impossibility on my health, and I say to your Honor I was in this courthouse at 9 o'clock this morning, I have been here every minute since that time. To work until 5:30 is beyond my physical abilities, and I urge your Honor in the interests of my health and in the interests of preserving this trial -- I previously informed your Honor I am under careful cardiologist's care. I had an appointment last night which I had to cancel which I have postponed until Thursday and I cannot go at a pace of working beyond normal hours, court hours.

THE COURT: We'll continue until 5 o'clock.

MR. EDELBAUM: May I have the production of the material?

MR. MC GUIRE: I will bring the material to the side bar.

MR. GOLDBERG: Mr. McGuire. Your Honor, I intend to ask him when is the last time that he spoke with and conferred with the defendant Dioguardi. The defendant Dioguardi went into jail on November 2nd or October 2nd, 1970. I don't want to have this viewed or have him state that it was before the defendant went into jail.

MR. MC GUIRE: I have cautioned him against that.

(In open court)

MR. GOLDBERG: May I proceed, your Honor?

THE COURT: You may.

MR. MC GUIRE: I am sorry, your Honor. I thought we had one more matter to take up at the side bar.

(At the side bar)

MR. MC GUIRE: I am producing for both counsel copies of Government's Exhibits 3544 and 3545 for identification, which consists of my handwritten notes, one of an interview between me and Mr. Hellerman on August 2, 1972 beginning at 9:40 p.m. and ending at 11:35 p.m. That's Exhibit 3544.

And another which is headed "Outline of prospective M.H. testimony," which has two dates on it, one December 13, 1972, and one December 29, 1972.

The two documents in total consists of five pages.

THE COURT: Very well.

(In open court)

THE COURT: We will conclude today at 5 o'cloc.

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